CERTIFICATE AND TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 694

THE UNITED STATES OF AMERICA

vs.

GEORGE OTIS SMITH

ON CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

CERTIFICATE FILED FEBRUARY 15, 1932
RECORD FILED FEBRUARY 26, 1932

SUPREME COURT OF THE UNITED STATES

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INDEX

	Page
Record from Supreme Court of District of Columbia	1
Caption	1
Petition for writ of quo warranto	1
Answer to petition for writ of quo warranto	9
Opinion of Justice Gordon	11
Senate, White House, and departmental precedents	31
Order denying petition for writ of quo warranto, with costs to petitioner	112
Appeal noted by United States of America	112
Assignment of errors	112
Designation of record	114
Clerk's certificate	115
Index to Senate, White House, and departmental precedents	117
Certificate from Court of Appeals of District of Columbia	123
Statement of facts	123
Question certified	134
Judges' signatures	135
Clerk's certificate (omitted in printing)	137
Order granting motion to bring up entire record and cause	137

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Supreme Court of the District of Columbia

At law No. 79553

UNITED STATES OF AMERICA, PETITIONER

vs.

GEORGE OTIS SMITH, RESPONDENT

UNITED STATES OF AMERICA,

District of Columbia, ss:

Be it remembered that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

Petition for writ of quo warranto

Filed May 4, 1931

In the Supreme Court of the District of Columbia

No. 79553

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE OTIS SMITH, RESPONDENT.

Leo A. Rover, United States attorney for the District of Columbia; John W. Davis, Alexander J. Groesbeck, counsel for the United States Senate.

1 TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE DISTRICT OF COLUMBIA:

Comes now the United States of America, by Leo A. Rover, United States attorney for the District of Columbia, and respectfully shows unto the court:

1. That by an act of the Congress of the United States approved the 23rd day of June, 1930, amending an act approved on the 10th day of June, 1920, there was created and established a commission to be known as the Federal Power Commission, composed of five commissioners who shall be appointed by the President, by and with the advice and consent of the Senate, one of whom shall be designated by the President as chairman and shall act as the principal executive

officer of the said commission. By said act of the Congress of the United States it is further provided that the commissioners
2 first appointed thereunder shall continue in office for terms of one, two, three, four, and five years, respectively, from June 23, 1930, the term of each to be designated by the President at the time of nomination.

2. That in pursuance of the statute aforesaid, the President of the United States, on the 3rd day of December, 1930, transmitted to the Senate of the United States the nomination of one George Otis Smith of Maine as a member of the Federal Power Commission for the term expiring on the 22nd day of June, 1935, said nomination being transmitted by letter in form as follows:

THE WHITE HOUSE, *December 3, 1930.*

To the Senate of the United States:

I nominate the following-named persons to be members of the Federal Power Commission for the terms herein designated as follows:

For the term expiring June 22, 1935, George Otis Smith, of Maine.

For the term expiring June 22, 1934, Frank R. McNinch, of North Carolina.

For the term expiring June 22, 1933, Ralph B. Williamson, of Washington.

For the term expiring June 22, 1932, Marcel Garsaud, of Louisiana.

For the term expiring June 22, 1931, Claude L. Draper, of Wyoming.

HERBERT HOOVER.

which said letter has since remained in the office of the Secretary of the Senate of the United States.

3. That in accordance with the rules of the Senate, the said nomination of the said George Otis Smith was duly referred to the Committee on Interstate Commerce, which said committee held
3 hearings and deliberated concerning the character, ability, and qualifications of the said George Otis Smith for the office to which he had been so nominated, and thereafter, to wit, on the 15th day of December, 1930, reported favorably to the Senate the name of the said George Otis Smith for the office to which he had been so nominated.

4. That on the 20th day of December, 1930, the Senate, in open executive session, undertook the consideration of the said nomination, and the following proceedings were had with reference thereto, to wit:

The presiding officer (Mr. Fess in the chair), stated the pending question, which was as follows:

"Shall the Senate advise and consent to the appointment of George Otis Smith, to be a member of the Federal Power Commission?"

On the question of agreeing thereto, yeas and nays were demanded by Mr. Dill, a Senator from the State of Washington, and the demand being supported by one-fifth of the Senators present the roll was called, whereupon 38 Senators were found to be voted in the affirmative and 22 in the negative and 35 not voting. So it was accordingly

"*Resolved*, That the Senate advise and consent to the appointment of the above named person to the office named agreeably to his said nomination."

That upon the announcement of the result of the vote so had the President pro tempore stated:

"The Senate advises and consents to the nomination and the President will be notified";

and no objection being made or further proceedings having been had in the Senate with reference to the said consent or the notification thereof, the following order was entered by the Secretary of the Senate in usual course upon the Executive Journal of the Senate for the said 20th day of December, 1930, to wit:

"*Ordered*, that the foregoing resolution of confirmation be forwarded to the President of the United States."

Any further proceedings having been had on the said day in the said executive session with reference to other nominations then pending before it, there was, in like manner, entered upon the Executive Journal of the Senate for the said day and date the following order, to wit:

"*Ordered*, that all resolutions of confirmation this day agreed to be forwarded forthwith to the President of the United States."

The executive business before the Senate having been thus disposed of, the Senate at 8.58 p. m. on said date resumed consideration of legislative business, all which will more fully and at large appear from the record of said proceedings spread upon the Executive Journal of the Senate at pages 186, 187, and 191 thereof, and from the report of the same contained in the Congressional Record of December 20, 1930, at pages 1260 and 1261.

5. That on the said 20th day of December, 1930, the same day on which the Senate so voted to advise and consent to the appointment of the said George Otis Smith, it thereafter adjourned in accordance with a concurrent resolution passed by the two Houses of Congress until 12.00 m., Monday, the 5th day of January, 1931.

6. That on Monday, the 22nd day of December, 1930, the Secretary of the Senate delivered by official messenger to the President of the United States the following communication, to wit:

In executive session, Senate of the United States. Saturday December 20, 1930

Resolved, that the Senate advise and consent to the appointment of the following-named persons to the offices named agreeably to their respective nominations:

Federal Power Commission

George Otis Smith, to be a member for the term expiring June 22, 1935.

Frank R. McNinch, to be a member for the term expiring June 22, 1934.

Marcel Garsaud, to be a member for the term expiring June 22, 1932.

Attest:

(Signed) EDWIN P. THAYER,
Secretary.

7. That thereupon the President of the United States, on the said 22nd day of December, 1930, signed and delivered, through the Department of State, a commission to the said George Otis Smith, purporting to appoint him a member of the Federal Power Commission and designated him chairman thereof; and the said George Otis Smith, forthwith and upon the same day and date took the oath of office prescribed by law as such member of the Federal Power Commission and chairman thereof, and undertook to assume and enter upon the discharge of the duties of said office, and has thence hitherto so continued.

6 8. That the vote and action of the Senate so had and taken on the 20th day of December, 1930, advising and consenting to the nomination of the said George Otis Smith as aforesaid was had and taken and the result thereof notified to the President, pursuant to and in accordance with the standing rules of the Senate, in such cases made and provided, the same having been adopted by the Senate in due exercise of the power vested in it by the Constitution of the United States.

9. That the said standing rules, being Nos. 38 and 39 of the standing rules of the Senate, are in form as follows:

"Rule XXXVIII. Executive session—Proceedings on nominations

"1. When nominations shall be made by the President of the United States to the Senate, they shall, unless otherwise ordered, be referred to appropriate committees; and the final question on every nomination shall be, 'Will the Senate advise and consent to this nomination?' which question shall not be put on the same day on which the nomination is received, nor on the day on which it may be reported by a committee, unless by unanimous consent.

"2. Hereafter all business in the Senate shall be transacted in open session, unless the Senate in closed session by a majority vote shall determine that a particular nomination, treaty, or other matter shall be considered in closed executive session, in which case all subsequent proceedings with respect to said nomination, treaty, or other matter shall be kept secret: Provided, That the injunction of secrecy as to the whole or any part of proceedings in closed executive session may be removed on motion adopted by a majority vote of the Senate in closed executive session; Provided further, That Rule XXXV shall apply to open executive sessions: And provided further, That any Senator may make public his vote in closed executive session.

"Anything in the rules of the Senate inconsistent with the foregoing is hereby repealed.

"3. When a nomination is confirmed or rejected, any Senator voting in the majority may move for a reconsideration on the same day on which the vote was taken, or on either of the next two days of actual executive session of the Senate; but if a notification of the confirmation or rejection of a nomination shall have been sent to the President before the expiration of the time within which a motion to reconsider may be made, the motion to reconsider shall be accompanied by a motion to request the President to return such notification to the Senate. Any motion to reconsider the vote on a nomination may be laid on the table without prejudice to the nomination, and shall be a final disposition of such motion.

"4. Nominations confirmed or rejected by the Senate shall not be returned by the Secretary to the President until the expiration of the time limited for making a motion to reconsider the same, or while a motion to reconsider is pending, unless otherwise ordered by the Senate.

"5. When the Senate shall adjourn or take a recess for more than thirty days, all motions to reconsider a vote upon a nomination which has been confirmed or rejected by the Senate, which shall be pending at the time of taking such adjournment or recess, shall fall; and the Secretary shall return all such nominations to the President as confirmed or rejected by the Senate, as the case may be.

"6. Nominations neither confirmed nor rejected during the
8 session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President; and if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President.

"RULE XXXIX. *The president furnished with copies of records of executive sessions.*

"The President of the United States shall, from time to time, be furnished with an authenticated transcript of the executive records of the Senate, but no further extract from the Executive Journal shall be furnished by the Secretary, except by special order of the Senate; and no paper except original treaties transmitted to the Senate by the President of the United States, and finally acted upon by the Senate, shall be delivered from the office of the Secretary without an order of the Senate for that purpose."

10. That pursuant to its adjournment had on the 20th day of December, 1930, as aforesaid, the Senate reconvened on the 5th day of January, 1931; and on that day went into open executive session; that thereupon one Thomas J. Walsh, a Senator from the State of Montana, who on the 20th day of December, 1930, had voted in the majority upon the question of advising and consenting to the appointment of the said George Otis Smith as a member of the Federal Power Commission, moved that the vote of the Senate taken as aforesaid, by
9 which the Senate advised and consented to the said nomination of the said George Otis Smith, be reconsidered, and accompanied said motion with a motion that the President be requested to return to the Senate the notification theretofore transmitted to him in that regard, which said motions were so made on the next day of actual executive session of the Senate after the vote upon said nomination had been taken, and were duly entered on the said 5th day of January, 1931, in manner and form as provided by the Standing Rules of the Senate hereinbefore set forth.

11. That thereafter the said motions came on to be considered in the Senate of the United States, and on the 9th day of January, 1931, the President pro tempore, under an agreement for unanimous consent, put to the vote of the Senate the motion so made and pending for reconsideration of the vote whereby the Senate had advised and consented to the appointment of the said George Otis Smith, and the motion prevailed by a vote of yeas, 44; nays, 37; not voting, 15; whereupon the President pro tempore put to the further vote of the

Senate the motion so made and pending to request the President to return to the Senate the notification theretofore sent to him by the Secretary of the Senate on the 22nd day of December, 1930, as aforesaid, which motion prevailed by a similar vote, all which will more fully and at large appear from the record of said proceedings spread upon the Executive Journal of the Senate, at pages 225 and 227 thereof. And thereupon the Secretary of the Senate forthwith forwarded to the President an authenticated transcript of the resolution requesting the return of the notification theretofore sent to him as aforesaid.

10 12. That on the 10th day of January, 1931, the President pro tempore laid before the Senate a message from the President of the United States reading as follows:

To the Senate of the United States:

I am in receipt of the resolution of the Senate dated January 5, 1931—

"That the President of the United States be respectfully requested to return to the Senate the resolution advising and consenting to the appointment of George Otis Smith to be a member of the Federal Power Commission, which was agreed to on Saturday, December 20, 1930."

I have similar resolutions in respect to the appointment of Messrs. Claude L. Draper and Col. Marcel Garsaud.

On December 20, 1930, I received the usual attested resolution of the Senate, signed by the Secretary of the Senate, as follows:

"*Resolved*, That the Senate advise and consent to the appointment of the following-named person to the office named agreeably to his nomination:

"Federal Power Commission

"George Otis Smith, to be a member of the Federal Power Commission."

I received similar resolutions in respect to Colonel Garsaud and Mr. Draper.

I am advised that these appointments were constitutionally made, with the consent of the Senate formally communicated to me, and that the return of the documents by me and reconsideration by the Senate would be ineffective to disturb the appointees in their offices.

I can not admit the power in the Senate to encroach upon the
11 Executive functions by removal of a duly appointed executive officer under the guise of reconsideration of his nomination.

I regret that I must refuse to accede to the requests.

HERBERT HOOVER.

The WHITE HOUSE, *January 10, 1931.*

13. That on the 10th of January, 1931, the said Thomas J. Walsh, a Senator as aforesaid, made a motion in the Senate of the United States to direct the Executive Clerk of the Senate to place on the Executive Calendar for the action of the Senate the name and nomination of the said George Otis Smith, which motion was agreed to by a vote of the Senate as follows: yeas, 36; nays, 23; not voting, 37; and thereupon the President pro tempore made order accordingly;

all which will more fully and at large appear from the record of said proceedings spread upon the Executive Journal of the Senate, at pages 233 and 234 thereof.

14. That thereafter, on the 23rd day of January, 1931, the President pro tempore of the Senate, in open executive session, put to a vote a motion by the said Thomas J. Walsh, a Senator as aforesaid, that the nomination of George Otis Smith, of Maine, for the office of member of the Federal Power Commission be recommitted to the Committee on Interstate Commerce for its consideration, which motion prevailed by the following vote: Yeas, 45; nays, 32; not voting, 19; all which will more fully and at large appear from the record of said proceedings spread upon the Executive Journal of the Senate, at page 306 thereof.

15. That thereafter, on the 3rd day of February, 1931, one
12 James Couzens, a Senator from the State of Michigan, acting for and on behalf of the Committee on Interstate Commerce, reported to the Senate without recommendation the nomination of the said George Otis Smith for the office of member of the Federal Power Commission, and the name and nomination of said George Otis Smith was thereupon ordered to be placed on the Executive Calendar for the further action of the Senate; all which will more fully and at large appear from the record of said proceedings spread upon the Executive Journal of the Senate, at page 351 thereof.

16. That thereafter on the 4th day of February, 1931, when the name and nomination of said George Otis Smith, of Maine, to be a member of the Federal Power Commission was read, the President pro tempore stated the question as follows:

"Will the Senate advise and consent to the appointment of George Otis Smith to be a member of the Federal Power Commission, for a term expiring June 19, 1935?"

On the question of agreeing thereto, the yeas and nays having been demanded, the roll of the Senate was called, and 33 Senators voting in the affirmative and 40 Senators voting in the negative and 23 Senators not voting, it was

"*Resolved*, That the Senate do not advise and consent to the appointment of George Otis Smith, to be a member of the Federal Power Commission, for a term expiring June 19, 1935."

all which will more fully and at large appear from the record of said proceedings spread upon the Executive Journal of the Senate, at page 366 thereof. That the said vote of the Senate not
13 advising and consenting to the appointment of the said George Otis Smith was put and taken upon the nomination of the said George Otis Smith, transmitted by the President of the United States to the Senate on the 3rd day of December, 1930, as aforesaid, and upon no other nomination, although as appears from the said record the date for the expiration of the term for which the said George Otis Smith had been so nominated was by clerical error stated to be the 19th day of June, 1935, instead of the 22nd day of June, 1935, as the fact in truth was.

17. That thereafter, on the 7th day of February, 1931, two days of actual executive session of the Senate having transpired since the

action last aforesaid, the Secretary of the Senate delivered by messenger to the President of the United States a notice of the rejection of the said nomination in form as follows:

Rejection

In executive session, Senate of the United States

Wednesday, February 4 (legislative day, Monday, January 26), 1931

Resolved, That the Senate do not advise and consent to the appointment of the following-named person:

Federal Power Commission

George Otis Smith, of Maine, to be a member of the Federal Power Commission, for the term expiring June 22, 1935.

(Signed) EDWIN P. THAYER.

18. That as clearly appears from the proceedings, so taken and the votes so had, the appointment of the said George Otis Smith to the office of member of the Federal Power Commission was not advised and consented to by the Senate of the United States, but, on the contrary, the Senate of the United States, by action duly and regularly taken in that behalf, and pursuant to and in accordance with its standing rules, refused to advise and consent to the appointment of the said George Otis Smith to the office aforesaid.

19. That by reason of the matters and things hereinbefore shown to the court, the said George Otis Smith, the commission issued to him on the 22nd day of December, 1930, as aforesaid, to the contrary notwithstanding, has not been duly and legally appointed to the office member of the Federal Power Commission, or duly and legally designated as chairman thereof; that he has usurped, intruded into, and now unlawfully holds and exercises the office of member of the Federal Power Commission and chairman thereof, and unlawfully claims and assumes to be such member and chairman.

20. That on the 5th day of February, 1931, the Senate of the United States adopted Senate Resolution No. 415, reading in part as follows:

"That the district attorney for the District of Columbia be, and he hereby is, requested to institute proceedings in quo warranto under the code of the said District in the Supreme Court thereof to test the right of George Otis Smith as a member of the Federal Power Commission; that he, the district attorney, be requested to associate with him counsel for the United States Senate in such proceedings * * *"

pursuant whereto this petition is now presented to the court.

21. Your petitioner therefore prays that a writ of quo warranto issue in the name of the United States against the said George Otis Smith, requiring him to show by what warrant he holds or exercises the office of member and chairman of the Federal Power Commission; that he be required to answer the averments of this petition, and that such proceedings be had as are prescribed by law; and if thereupon it shall be adjudged that the said George Otis Smith has so usurped, intruded into, and unlawfully holds the office of

member and chairman of the Federal Power Commission that he be ousted and excluded therefrom.

And your petitioner will ever pray, etc.

LEO A. ROVER,
United States Attorney for the District of Columbia.

JOHN W. DAVIS,
ALEXANDER J. GROESBECK,
Counsel for the United States Senate.

Answer to petition for writ of quo warranto

Filed May 23, 1931

In the Supreme Court of the District of Columbia

At law, No. 79553

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE OTIS SMITH, RESPONDENT

George Wharton Pepper, attorney for the respondent.

16 TO THE HONORABLES THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE DISTRICT OF COLUMBIA:

The answer of George Otis Smith, the above-named respondent, to the petition of the United States of America respectfully represents:

1. The respondent admits the averments of the first paragraph of the petition.

2. The respondent admits the averments of the second paragraph of the petition, saving the final clause thereof, and alleges that the President, in nominating the respondent and others to be members of the Federal Power Commission, was acting in discharge of a duty laid upon him by the Constitution of the United States. The respondent denies the averment in the last clause of said paragraph that the letter of nomination has since its receipt remained in the office of the Secretary of the Senate and alleges that the same was duly referred and delivered to the Committee on Interstate Commerce,

17 was reported back to the Senate by said committee, was acted upon by the Senate in due course and since the appointment of the respondent to the office in question has remained in the custody of the Senate only as a record of a closed transaction.

3. The respondent admits the averments of the third paragraph of the petition.

4. The respondent admits the averments of the fourth paragraph of the petition and alleges—

(a) That following the announcement by the Presiding Officer of the advice and consent of the Senate to the appointment of the respondent no objection was made by any Senator to the statement of the Presiding Officer that "the President will be notified"; and that pursuant to the established practice of the Senate in such cases the statement so made became as if by unanimous consent an order of the Senate to their Secretary.

(b) That the order of the Senate as aforesaid was thereupon duly recorded in the Executive Journal.

(c) That the order set forth as follows in the 4th paragraph of the petition:

"Ordered, that all resolutions of confirmation this day agreed to be forwarded forthwith to the President of the United States."

was announced by the President pro tem, that no Senator objected to the order so announced and that pursuant to the established practice of the Senate in such cases the order so made became as if by unanimous consent an order of the Senate to their Secretary.

18 (b) That upon the making of said orders it became and was the duty of the Secretary of the Senate under the rules of the Senate, as interpreted by the established practice of the Senate forthwith to notify the President that advice and consent had been given to the appointment of the respondent, without awaiting the expiration of the second subsequent day of actual executive session.

5. The respondent admits the averments of the fifth paragraph of the petition.

6. The respondent admits the averments of the sixth paragraph of the petition.

7. The respondent admits the averments of the seventh paragraph of the petition, and alleges that in virtue of the proceedings in said paragraph set forth he became and is a member of the Federal Power Commission and chairman thereof for the term expiring June 22, 1935.

8. The respondent alleges that the vote and action of the Senate so had and taken on the twentieth day of December, 1930, were pursuant to the provisions of the Constitution of the United States.

9. The respondent admits that Nos. 38 and 39 of the standing rules of the Senate, as the same have been in force since a date prior to said December 20, 1930, are correctly set forth in the ninth paragraph of the petition.

10. The respondent, upon information and belief, admits the
19 averments of the tenth paragraph of the petition but alleges that the facts therein set forth are irrelevant and immaterial.

11. The respondent, upon information and belief, admits the averments of the eleventh paragraph of the petition but alleges that the facts therein set forth are irrelevant and immaterial.

12. The respondent admits the averments of the twelfth paragraph of the petition.

13. The respondent, upon information and belief, admits the averments of the thirteenth paragraph of the petition, but denies that there was pending in the Senate at any time after December 22, 1930, any nomination to the office to which on that date the respondent had been appointed.

14. The respondent, upon information and belief, admits the averments of the fourteenth paragraph of the petition but denies that there was pending in the Senate at any time after December 22, 1930, any nomination to the office to which on that date the respondent had been appointed.

15. The respondent, upon information and belief, admits the averments of the fifteenth paragraph of the petition but denies that there was pending in the Senate at any time after December 22, 1930, any

nomination to the office to which on that date the respondent had been appointed.

16. The respondent, upon information and belief, admits the averments of the sixteenth paragraph of the petition but denies that there was pending in the Senate at any time after December 22, 1930, any nomination to the office to which on that date the respondent had been appointed.

20 17. The respondent, upon information and belief, admits the aver ments of the seventeenth paragraph of the petition but denies that there was pending in the Senate at any time after December 22, 1930, any nomination to the office to which on that date the respondent had been appointed.

18. The respondent denies the averments of the eighteenth paragraph of the petition and alleges that on December 20, 1930, the Senate advised and consented to his appointment to the office in question, that the Senate in due course notified the President of such advice and consent, that the President thereupon, by and with the advice and consent of the Senate, appointed the respondent to be a member of the Federal Power Commission and the chairman thereof for the term expiring June 22, 1935.

19. The respondent denies the averments of the nineteenth paragraph of the petition and avers that by virtue of his appointment by the President, by and with the advice and consent of the Senate, he became, was, and is a member of the Federal Power Commission and the duly and legally designated chairman thereof; that he holds the said office in virtue of said appointment made pursuant to the applicable provisions of the Constitution of the United States and that he is lawfully in possession of said office and is rightfully exercising the powers and discharging the duties imposed upon the members of said commission by the act of Congress which provided for its creation.

20. The respondent admits the averments of the twentieth paragraph of the petition.

21 21. The respondent prays the judgment of the court that he lawfully holds the office of member and chairman of the Federal Power Commission and that he be permitted to go hence without day.

GEORGE WHARTON PEPPER,
Attorney for Respondent.

22 In the Supreme Court of the District of Columbia. Law No. 79,553

UNITED STATES OF AMERICA, PETITIONER
vs.
GEORGE OTIS SMITH, RESPONDENT

Opinion
Filed December 5, 1931

This proceeding was begun by a petition filed May 4, 1931, by the United States attorney for the District of Columbia. The petition prayed that a writ of quo warranto issue against the respondent

George Otis Smith requiring him to show by what warrant he holds or exercises the office of member and chairman of the Federal Power Commission; that he be required to answer the averments of the petition and that if upon further proceedings it shall be adjudged that the said George Otis Smith has usurped, intruded into, and unlawfully holds the said office that he be ousted and excluded therefrom.

Respondent answered the petition asserting his right to the office under an appointment by the President of the United States, alleged to have been made by and with the advice and consent of the Senate, and prayed the judgment of the court that he lawfully holds the office in question.

The facts in the case are all matters of public record and about them there is no dispute. The answer, however, does challenge certain conclusions of law drawn from those facts, and counsel have elected to submit the matter upon petition and answer.

STATEMENT OF FACTS

Congress by an act of June 23, 1930, amending an act passed on June 10, 1920, created and established a commission to be
23 known as the Federal Power Commission, composed of five commissioners to be appointed by the President, by and with the advice and consent of the Senate, and empowered the President to designate one of the commissioners as chairman to serve as the principal executive officer of the commission; and further provided that the office of the commission shall be in the District of Columbia where its general sessions shall be held.

On December, 3, 1930, the President transmitted to the Senate the nomination of George Otis Smith to be a member of the Federal Power Commission for a term expiring June 22, 1935. The Senate on December 20, 1930, in open executive session, and by a vote of 38 to 22, advised and consented to the appointment of the respondent to the office for which he had been nominated. On the same day it was ordered by the Senate that the resolution of confirmation be forwarded forthwith to the President. That upon the announcement of the result of the vote so had the President pro tempore stated: "The Senate advises and consents to the nomination and the President will be notified;" and no objection being made or further proceedings having been had the following order was entered by the Secretary of the Senate upon the Executive Journal of the Senate for that date, to wit:

"Ordered, that the foregoing resolution of confirmation be forwarded to the President of the United States."

and further proceedings having been had that day in said executive session with reference to nominations then pending before it there was in like manner entered upon said Journal the following order, to wit:

"Ordered, that all resolutions of confirmation this day agreed to be forwarded forthwith to the President of the United States."

This order was entered late in the evening of Saturday, December
20th, and later the same day the Senate adjourned in accord-
24 ance with a concurrent resolution of the two houses of Congress until noon of Monday, January 5, 1931. On Monday, December 22, 1930, the Secretary of the Senate executed said order and delivered by official messenger to the President the following communication:

In executive session, Senate of the United States, Saturday, December 20, 1930

Resolved, That the Senate advise and consent to the appointments of the following named persons to the offices named agreeably to their respective nominations:

Federal Power Commission

George Otis Smith, to be a member for the term expiring June 22, 1935.

Frank R. McNinch, to be a member for the term expiring June 22, 1934.

Marcel Gersaud, to be a member for the term expiring June 22, 1932.

Attest:

(Signed) EDWIN P. THAYER,
Secretary.

Subsequently and on the same day the President signed, and through the Department of State delivered to respondent a communication purporting to appoint him a member of the Federal Power Commission and designating him chairman thereof. The respondent then on the same day took the oath of office and undertook forthwith to discharge the duties of said office.

On Monday, January 5, 1931, which was the next day of actual executive session of the Senate after said confirmation, a motion to reconsider was made by a Senator who had voted to confirm, accompanied by a motion to request the President to return the resolution of confirmation which had been transmitted to him by the Secretary of the Senate. Both motions were duly adopted and the President was notified in due course on January 9, 1931. The President, on January 10, 1931, informed the Senate by a message in writing to the effect that he had appointed respondent to the office in question after receiving notification of confirmation and therefore refused to accede to the Senate's requests. The message of the President read as follows:

To the Senate of the United States:

I am in receipt of the resolution of the Senate dated January 5, 1931—

"That the President of the United States be respectfully requested to return to the Senate the resolution advising and consenting to the appointment of George Otis Smith to be a member of the Federal Power Commission, which was agreed to on Saturday, December 20, 1930."

I have similar resolutions to the appointment of Messrs. Claude L. Draper and Col. Marcel Gersaud.

On December 20, 1930, I received the usual attested resolution of the Senate, signed by the Secretary of the Senate, as follows:

"Resolved, That the Senate advise and consent to the appointment of the following-named person to the office named agreeably to his nomination:

"Federal Power Commission

"George Otis Smith, to be a member of the Federal Power Commission.

I received similar resolutions in respect to Colonel Gersaud and Mr. Draper.

I am advised that these appointments were constitutionally made, with the consent of the Senate formally communicated to me, and that the return of the documents by me and reconsideration by the Senate would be ineffective to disturb the appointees in their offices. I can not admit the power in the Senate to encroach upon the Executive functions by removal of a duly appointed executive officer under the guise of reconsideration of his nomination.

I regret that I must refuse to accede to the requests.

HERBERT HOOVER.

The WHITE HOUSE, *January 10, 1931.*

Thereafter a motion was made and adopted in the Senate directing the Executive Clerk of the Senate to place on the Executive Calendar for the action of the Senate "the name and nomination of the said George Otis Smith." Subsequently, on February 4, 1931, the
26 President pro tempore of the Senate put to the Senate the question of the advice and consent to the appointment of the respondent, and the majority of Senators voted in the negative. Notification of this action was sent to the President on February 7, 1931.

On February 5, 1931, the Senate by resolution requested the district attorney of the District of Columbia to institute in this court proceedings in quo warranto under the code of the District of Columbia to test respondent's right to hold his office.

The sole question for the determination of the court is one of law, namely, was the respondent George Otis Smith, appointed by the President by and with the advice and consent of the Senate, or did the Senate in strict conformity with its rules refuse that advice and consent.

27 SENATE RULES INVOLVED

Rule XIII

1. When a question has been decided by the Senate, any Senator voting with the prevailing side may, on the same day or on either of the next two days of actual session thereafter, move a reconsideration; and if the Senate shall refuse to reconsider, or upon reconsideration shall affirm its first decision, no further motion to reconsider shall be in order unless by unanimous consent. Every motion to reconsider shall be decided by a majority vote, without debate, and may be laid on the table without affecting the question in reference to which the same is made, which shall be a final disposition of the motion.

2. When a bill, resolution, report, amendment, order, or message, upon which a vote has been taken, shall have gone out of the possession of the Senate, and been communicated to the House of Representatives, the motion to reconsider shall be accompanied by a motion to request the House to return the same; which last motion shall be acted upon immediately, and without debate, and if determined in the negative, shall be a final disposition of the motion to reconsider.

Rule XXXVIII

1. When nominations shall be made by the President of the United States to the Senate, they shall, unless otherwise ordered, be referred to appropriate committees; and the final question on every nomination shall be, "Will the Senate advise and consent to this nomination?" which question shall not be put on the same day on which the nomination is received, nor on the day on which it may be reported by a committee, unless by unanimous consent.

2. Hereafter all business in the Senate shall be transacted in open session, unless the Senate in closed session by a majority vote shall determine that a particular nomination, treaty, or other matter shall be considered in closed executive session, in which case all subsequent proceedings with respect to said nomination, treaty, or other matter shall be kept secret: Provided, That the injunction of secrecy as to the whole or any part of proceedings in closed executive session may be removed on motion adopted by a majority vote of the Senate, in closed executive session: Provided further, That Rule XXXV shall apply to open executive sessions: And provided further, That any Senator may make public his vote in closed executive session.

Anything in the rules of the Senate inconsistent with the foregoing is hereby repealed.

3. When a nomination is confirmed or rejected, any Senator voting in the majority may move for a reconsideration on the same day on which the vote was taken, or on either of the next two days of actual executive session of the Senate; but, if a notification of the confirmation or rejection of a nomination shall have been sent to the President before the expiration of the time within which a motion to reconsider may be made, the motion to reconsider shall be accompanied by a motion to request the President to return such notification to the Senate. Any motion to reconsider the vote on a nomination may be laid on the table without prejudice to the nomination, and shall be a final disposition of such motion.

28 4. Nominations confirmed or rejected by the Senate shall not be returned by the Secretary to the President until the expiration of the time limited for making a motion to reconsider the same, or while a motion to reconsider is pending, unless otherwise ordered by the Senate.

5. When the Senate shall adjourn or take a recess for more than thirty days, all motions to reconsider a vote upon a nomination which has been confirmed or rejected by the Senate, which shall be pending at the time of taking such adjournment or recess, shall fall; and the Secretary shall return all such nominations to the President as confirmed or rejected by the Senate, as the case may be.

6. Nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President; and if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President.

Rule XXXIX

The President of the United States shall, from time to time, be furnished with an authenticated transcript of the executive records of the Senate, but no further extract from the Executive Journal shall be furnished by the Secretary, except by special order of the Senate; and no paper, except original treaties transmitted to the Senate by the President of the United States, and finally acted upon by the Senate, shall be delivered from the office of the Secretary without an order of the Senate for that purpose.

It is contended by the petitioner that—

"First. Rules XXXVIII and XXXIX of the standing rules of the Senate by their explicit terms empowered the Senate to entertain a motion, made before the expiration of the next two days of actual executive session, to reconsider its vote advising and consenting to the appointment of the respondent, even though the President had been formally notified of such consent.

"Second, In adopting Rules XXXVIII and XXXIX the Senate did not exceed the power vested in it by article 1, section 5, of the Constitution, and that the rules are binding upon both the Senate and the Executive.

"Third. The signing and delivery of a commission and the taking of an oath by the respondent can not fortify the position of the respondent or shield him from ouster by this court."

29 In support of these contentions it is argued by petitioner that the Senate proceeded in this matter in strict compliance with its rules; that the rules do not ignore constitutional restraint, or violate fundamental rights; that the Senate order that the resolution of confirmation be sent to the President forthwith did not preclude reconsideration within two days of actual executive session next succeeding the vote, and that such notification was not tantamount to a warrant to proceed forthwith to issue the commission, and that it did not waive or suspend its rules, nor could it suspend its rules except by unanimous consent; that notwithstanding the notification the President was chargeable with knowledge that the Senate retained its right to reconsider the nomination; that the question of reconsideration could have been finally disposed of immediately after the vote of confirmation, by a motion to reconsider the vote on the nomination and by having that motion laid on the table; that the power to reconsider was not lost because the President had acted and appointed respondent before the request for return of the notification was received; that the Senate never lost control of the subject matter; that the nomination remained in its custody and possession in its files and records from the date it was first received from the President until the present time; that the rules are plain, explicit, and unambiguous, therefore judicial construction is not called into play; and that notwithstanding the President's refusal to return the resolution of notification, the Senate retained the power to reconsider the nomination and finally reject it; and that it clearly appears from the record of the proceedings in the Senate that the Senate did not advise and consent to the appointment of the respondent to the office of member of the Federal Power Commission, but on the contrary, that the Senate by its action duly and regularly taken, in accordance
30 with the standing rules, refused to advise and consent to his appointment, and that despite the issuance of a commission

and the taking of an oath of office, respondent has not been duly and regularly appointed to said office or duly or regularly designated as its chairman, and therefore he has been and is at present unlawfully holding and exercising the office of member and chairman of the commission.

It is contended by the respondent that—

"First. The Senate of the United States had no power to reconsider its action in this case if and when the transaction had passed out of its control and had not been restored to its control by the voluntary action of the Executive.

"Second. In this case the Senate by its own voluntary and deliberate act, surrendered its control over the transaction to the Executive, when having voted to advise and consent to the appointment, it directed that the Executive be notified forthwith and the Executive was so notified.

"Third. The President upon receiving that notification was wholly justified in assuming that it was a notification sent to him to the end that he might act; that he was well within his constitutional authority when he did act and signed the commission of the respondent."

Briefly, the respondent urges that when the Senate advised and consented to the nomination and notified the President of its action, that legislative branch of the Government parted with its control over the subject matter which thereupon passed into the hands of the Executive, and that thereafter there could be nothing upon which the legislative body could take further action, unless and until the Executive at or without request should restore to the Senate the control with which it had voluntarily parted; and that the Executive, after appointment, could not restore the control to the Senate without violating and infringing the rights of the appointee.

31 In Article II, section 2, of the Constitution it is provided that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law." In section 3 of the same article, the President is directed to "commission all the officers of the United States."

In Marbury *v.* Madison, 1 Cranch, 137, 155–156 (1803), after quoting the above clauses of the Constitution, Chief Justice Marshall says:

"They seem to contemplate three distinct operations: 1st, the nomination. This is the sole act of the President, and is completely voluntary. 2d, the appointment. This is also the act of the President, and is also a voluntary act, though it can only be performed by and with the advice and consent of the Senate. 3d, the commission. To grant a commission to a person appointed, might, perhaps, be deemed a duty enjoined by the Constitution. 'He shall' says that instrument, 'commission all the officers of the United States.'"

He then proceeds to point out the fact that "the commission is not necessarily the appointment though conclusive evidence of it."

It thus appears from section 2 that three separate and distinct steps are contemplated by the Constitution. In the first place, the President nominates the person proposed to be appointed. Second, the Senate must advise and consent that the nominee should be appointed, and lastly in pursuance of the nomination and the advice and consent of the Senate the President makes the appointment.

It is not questioned that the appointment is complete when the President has signed the commission, and the subsequent taking of the oath and the delivery of the commission to the appointee are not a part of the appointing process.

32 It is conceded that the Senate has no power of removal, and, when an officer has been duly confirmed and regularly appointed, the Senate has no power by a subsequent alteration of its vote to disturb him in that office. It is further conceded that when the Senate has once finally given its advice and consent to a nomination, in conformity with its rules, its power in respect to that nomination is exhausted, and its decision, so far as the Senate is concerned, is irrevocable.

The decision of this controversy necessarily involves the consideration of the Senate rules relating to the reconsideration of a vote confirming or rejecting a nomination, and the meaning and purpose of those rules may be better understood by reviewing their development.

An historical survey of the development of the rules of the Senate relating to the reconsideration of a vote confirming or rejecting a nomination and the precedents of the Senate under those rules will enable us to apply the existing rules to the facts of the present case.

An historical survey of such rules from their beginning to the present date is hereto appended.

There was used at the hearing of this case a pamphlet containing a list of Senate precedents for reconsideration of confirmations or rejections after notification of the Senate's action to the President, from 1829 to May, 1930, compiled in the legislative reference service of the Library of Congress, at the request of counsel for both parties in this case. In this pamphlet there is a brief summary of the facts and the action of the Senate in each case and a reference to the volume and pages of the Executive Journal where the official action of the Senate therein is recorded. The pamphlet is filed herewith and

33 will be referred to as "Senate Precedents."

Did the Senate by its action of December 20th, 1930, reserve its right of reconsideration of its vote or did it by its unanimous resolution directing the Secretary to notify the President of its action part with its control of the matter and waive its election to reconsider its vote?

If the Senate had not adopted the resolution notifying the President forthwith of the confirmation of the respondent, the Secretary of the Senate would have been bound by the provisions of the following section of the rules:

"Nominations confirmed or rejected by the Senate shall not be returned by the Secretary to the President until the expiration of the time limited for making a motion to reconsider the same, or while a motion to reconsider is pending, unless otherwise ordered by the Senate." (Ibid., p. 7.)

If the Senate had not "otherwise ordered," the action on the nomination would have remained in the Senate until the expiration of two subsequent days of actual executive session, and there would have been no question that the transaction continued in the control of the Senate. In any event the President could not in the interval have proceeded to appoint, for he would have lacked the advice and consent of the Senate, which are prerequisite to such action.

It is urged that the real significance of formal notification by the Senate to the President is the transit of control over the transaction from the legislative to the executive department, just as the significance of the return of the notification by the President would be the restoration of control by the executive to legislative branch.

If the Senate elected to treat its vote of consent as final, and proceeded to surrender its control over the transaction by referring
34 the matter back to the President for executive action executive control would thereupon be resumed and it would become optional with the President to appoint or not to appoint. Even though the Senate had thus parted with control and thus referred the matter back to the President it may, if it acts before the President appoints regain control, if the President complies with the Senate's request and returns the resolution of notification. The rule provides that in such case if a motion to reconsider is made it shall be accompanied by a motion to request the President to return to the Senate the notification of confirmation. This was the course the Senate in this case sought to pursue, but the President had already appointed. If the Senate had lost control of the transaction and the President having appointed, he would also have parted with his control over the matter and the President could not have disturbed the appointee in his office except by the exercise of his power of removal.

The general rule in a parliamentary body is that a motion to reconsider comes too late if the body has parted with the possession and control of the subject matter. In Jefferson's Manual, Section XLIII, second paragraph, there is the following statement on the general subject of reconsideration:

"If, after the vote, the paper on which it is passed has been parted with, there can be no reconsideration; as if a vote has been for the passage of a bill, and the bill has been sent to the other House."

The constitutional provision for the consent and advice of the Senate of a nomination is not a provisional or conditional one. Rule XXXVIII contains no provision that reconsideration may be proceeded with if the President fails to return the notification. Can the Senate consent to a nomination and advise the President of such action and then say that the action of which it had advised the President, in accordance with its rules, was merely conditional upon
35 its option or election to reconsider the previous vote on the matter, and if so would its rule in that regard be constitutional?

The first rule that provided for reconsideration by the Senate of its previous action was Senate rule of 1790, and that rule, together with the rule with respect to the matter passing out of the possession of the Senate on announcing its action, as amended by the rules of 1806, 1818, and 1820, were numbered 21, renumbered 19 (appendix, p. 2, p. 3), and later embodied in rule 20 (appendix, p. 20), and now the present Rule XXXVIII (supra, p. 6).

Original rule 21, sanctioned reconsideration within three subsequent days of actual session, but provided that no motion for reconsideration of a vote shall be in order if a bill, resolution, message, report, amendment, or motion, upon which a vote was taken, shall have gone out of the possession of the Senate, nor after the usual message shall have been sent from the Senate announcing their decision. (Appendix, p. 2.)

The Senate had a right to retain possession but if this was parted with reconsideration was no longer possible. Since this was the general rule but in the case of nominations after definite action, it was evident the Senate thought it ought not to keep control of a case beyond the day on which it was taken as the rule adopted on March 27, 1818, provided that all nominations approved or definitely acted upon by the Senate should be returned by the Secretary to the President from day to day as the proceedings occurred, any rule or usage to the contrary notwithstanding. (Appendix, p. 2.)

Under this rule it is clear that after notification to the President reconsideration was out of order.

The Senate so decided by unanimous vote in 1830 in the case
36 of Isaac Hill, nominated Second Comptroller of the Treasury, "Motion to reconsider unanimously held not in order April 14, because the President had been notified." (See Senate Precedents, p. 5, Senate Executive Journal, vol. 4, pp. 90–93.)

In the case of Joseph K. Barnes, nominated March 2, 1864, return of resolution was requested and motion to reconsider entered March 7, 1864. The Senate permitted a Senator to withdraw his motion for reconsideration after President Lincoln had advised the Senate that he had already made the appointment in question. This precedent shows that notwithstanding the flat declaration of the Senate that after loss of possession reconsideration was too late, the Senate entertained a motion to reconsider and requested the return of the resolution and then abandoned its course when informed that the President had already appointed. The only two significant changes in the provisions of the present rules not contained in the earlier are, first, the right of the Senate to defer notification for two days and, second, the provision for a motion to request the President to return the notification. (Appendix, pp. 6–8.)

In the case of John H. Goddard, confirmed May 18, 1864, return of resolution was requested and motion to reconsider entered June 7th. The President replied June 25th to the effect that he had received the request for the return of the resolution advising and consenting to the appointment of Goddard and that the resolution of notification was received May 19th, and that Goddard was commissioned on the same day, and that the appointment being thus perfected, the resolution had become a part of the permanent records of the Department of State. There is no record of any further action upon it by the Senate. (Senate Precedents, p. 18, Senate Executive Journal, vol. 13, pp. 350, 351, 625.)

37 In the case of Westley Frost, confirmed February 23, 1867, return of the resolution notifying of the Senate action requested February 27th. The President on March 2d replied transmitting a report from the Secretary of the Treasury to the effect that Frost was commissioned and qualified on February 26th. The appointment had been made after the resolution of confirmation and before notice of a resolution to reconsider. The appointee had not actually taken the oath of office. The Senate defeated a resolution requesting the Secretary of the Treasury to recall the commission. The resolution was submitted on March 25th (Senate Executive Journal, vol. 15, pp. 246, 277, 284):

"Whereas it appearing that on the 27th day of February last the Senate recalled its action on the nomination of Westley Frost as

assessor of the 21st district of Penna., and that he did not take the oath of office until the 2d day of March; therefore

"Resolved, That the Secretary of the Treasury recall the commission of the said Frost until the action of the Senate upon his nomination."

Senator Sherman submitted another resolution April 1st to the effect that the Secretary of the Treasury be requested to recall the commission issued to Frost, it appearing that his confirmation was recalled before he received such commission or was sworn into office; and that the President be requested to return to the Senate the action of the Senate in the appointment of the said Frost. This resolution was rejected. (Senate Precedents, pp. 28, 29, and 30, Senate Executive Journal, vol. 15, pp. 519, 501.)

A study of the Senate precedents down to and including March, 1867, reveals consistent action by the Senate in declining to reconsider any nomination after (by notification to the President) the case had passed from the control of the legislative into the control of the executive branch of the Government. Under the rules as they then stood there was indeed no provision for a request upon the
38 President for a return of the papers; but only a flat declaration that a motion to reconsider was out of order if the resolution of notification had gone out of the possession of the Senate.

Notwithstanding there was no provision in the rules requiring it, in every case, after notification, such requests were made for the return of such resolutions exactly as they would be under the present rules. If a request for return is actually made and the question is whether the fact of prior appointment shall be accepted by the Senate as a satisfactory Executive reply, it would seem to be quite immaterial whether the making of the request was the result of unwritten usage or of written rule. The result actually reached by the Senate during the period from 1790 to 1867 was that after the Senate lost control or possession of a matter by notification to the President unless the President restored control by returning the resolution of notification the Senate could not reconsider its vote on the nomination.

Prior to April, 1867, irrespective of the limited period during which the Senate could reconsider, its power to do so was ipso facto lost once the resolution had gone out of its possession, announcing its decision. In other words the transmission of the resolution of notification was the controlling factor.

On April 6, 1867, the Senate rule relating to reconsideration was amended. Perhaps it was questioned whether after possession had been lost, reconsideration could ever thereafter be in order under the rule, even if possession was restored by Executive action. The amendment accordingly made the letter of the rule conform to pre-existing usage by excepting nomination cases from the flat declaration that reconsideration was always out of order after loss of
39 possession, and added the proviso that, in nomination cases, after notification to the President, the motion to reconsider must be accompanied by a request for return. (Appendix, p. 4.) There is no provision in the rule that if the request to restore possession is not complied with, the Senate may nevertheless vote a reconsideration. Nor is there any provision of the rule that such course may be taken by the Senate if, after notification, the President has actually appointed and his reply to the Senate so states.

At this point it might be well to observe that a nomination by the President, whether in the form of a letter or message of the President to the Senate or any other message or written communication from the President to the Senate, other than a treaty, is never returned by the Senate to the President, but always has remained in the files and records of the Senate; and notwithstanding the provisions of the various Senate rules directing the Secretary to return to the President nominations as either confirmed or rejected, or not acted upon, such nominations are not now and never have been actually returned by the Secretary to the President, but merely a copy of the resolution or notification advising of the Senate's action or its failure to act on such nominations is sent to the President. The actual paper always remains in the files of the Senate. So the language of the rules "shall have gone out of the possession of the Senate, announcing their decision," and the phrases directing the Secretary of the Senate to return nominations to the President and the direction to the Secretary to notify the President of the Senate's action on nominations, are interchangeably used as expressions of relinquishing possession and control of the matter.

40 While, therefore, the mere insertion of a provision for a request for return made no substantial change in the rule, one effect of the amendment of 1867 was to prolong the time during which, after confirmation and before notification, the Senate might make up its mind whether or not to reconsider. By the earlier rule the Secretary of the Senate had been instructed to return to the President "from day to day" all nominations as soon as action upon them had been taken. By the amendment of 1867 this instruction was so changed that the Secretary was to notify the President "on the next day after such action is had." The Senate, however, reserved to itself the right to part with possession at an earlier or later date by adding the proviso "unless otherwise ordered by the Senate." (Appendix, pp. 2, 4.)

A further amendment was made on March 25, 1888. This was during the administration of President Johnson. So far as applicable to the present question, the amendment merely extended the time for notification to the President to the expiration of the time limit for making a motion to reconsider, i. e., the two next days of actual session. Again, however, the Senate reserved its right to part with possession within the two days by adding the same proviso as before. (Appendix, pp. 4, 5.)

That the Senate was all the while consistently adhering to the principle stated by Jefferson appears from the action taken in the Boseman case in 1873. B. A. Boseman was confirmed as deputy postmaster at Charleston Court-House, S. C., and the President was notified "forthwith" March 18, 1873. The nomination was withdrawn March 21st. The same day the Senate unanimously "Resolved, That the nomination of B. A. Boseman, of Charleston S. C., having been confirmed and finally disposed of by the

41 Senate and so certified to the President, can not be withdrawn, the same having gone out of the possession of the Senate." Here a nomination had been confirmed and the Senate had elected to treat its action as final by notifying the President "forthwith." Three days later the President attempted to withdraw the nomination. The notification received by him from the Senate had terminated senatorial possession and had restored Executive control.

It is impossible to escape the conclusion that such Senate action is wholly inconsistent with a reserved right, after notification, to retake possession of the transaction except by Executive compliance with a request for return. Accordingly in the case of J. C. S. Colby, confirmed and the President notified "forthwith," December 17, 1874, a motion to reconsider was entered and a return of the resolution of notification was requested December 21st. The President in his reply of January 5, 1875, acknowledged receipt of the resolution requesting the return of the resolution of confirmation and advised that the commission was signed December 17th, and had been forwarded to Colby before receipt of the resolution of recall (Senate Precedents, p. 52), and the Senate accepted this reply of President Grant as conclusive. (Senate Executive Journal, vol. 19, p. 460.)

On January 7, 1877, the Senate rules were again amended. It will be recalled that up to that date there was nothing in the rules which explicitly authorized the Senate to request the return of a measure after it had passed into the possession of the House. By this amendment the case of the House was assimilated to that of the President, i. e., in both cases, after possession had been parted with, a motion to reconsider must be accompanied by a motion of request for return. This amendment strengthens the view that a compliance with the request for return must precede a vote on the motion to reconsider. It must be obvious that the Senate would be powerless to affect the subsequent course of events if the House, after notification, had acted on the matter in hand and so advised the Senate. The only way in which the amendment of 1877 specifically affected the case of nominations was by extending the time for notification to "the next two days of actual executive session." The right to notify sooner was again reserved by retaining the proviso "unless otherwise ordered by the Senate." (Appendix, p. 6.)

42

While the rules stood thus the case of Morris Marks came up in 1878. A motion to reconsider was entered and return of resolution requested June 11th. The President replied June 14th:

"In reply I would respectfully inform the Senate that upon receipt of the notice of confirmation the commission of Mr. Marks was signed and delivered to him on the 8th instant."

This we may assume was accepted as satisfactory as no subsequent proceeding was recorded.

The Senate rules on reconsideration took their present form on January 11, 1884 (ibid., pp. 6, 7). Rule XIII now deals with reconsideration of action where control has passed to the House and the provision on that subject is the same as theretofore. Rule XXXVIII is devoted to reconsideration in the case of Executive nominations. No change of substance was made by it. The principle of possession as necessary to effective reconsideration is still recognized by the provision for a request for return of notification. The time within which the Senate must make up its mind whether or not to treat a vote of confirmation as final is still two days of actual executive session. The right within that time to part with possession by notification to the President is still preserved. In short, the Senate rule in its present form indicates no departure whatever from the theory which inspired the very earliest rule—namely, that parliamentary reconsideration is impossible unless the subject-matter is still within the Senate's possession. Changes since 1790 are really

43

matters of detail—such as the substitution of a request for Executive return for the flat declaration that after notice to the President reconsideration was not in order, the extension of the time for notifying the President, and the reservation of the right to notify him sooner. The present case is the first since the rule took its present form in which the President has stood upon his rights and the Senate has taken issue with him.

After an appointment is made by the President upon notification by the Senate of its confirmation of a nominee, the President is without authority to restore control to the Senate by a return of the resolution of notification.

In the case of United States *v.* Le Baron, 19 How. 73 (1856), President Taylor had nominated Beers to be deputy postmaster of Mobile. The Senate had duly consented to the nomination. The President thereupon signed the officer's commission, but died before it was transmitted to the appointee. Thereafter Beers attempted to discharge his duties as deputy postmaster and because of alleged breach of duty, action for debt was brought by the United States upon the official bond signed by Beers and two sureties, one of whom was Le Baron. By way of defense Le Baron relied (inter alia) upon the proposition that Beers was not in office under the appointment because the commission had not been transmitted until after the President's death. This defense was adjudged insufficient. At page 78 Mr. Justice Curtis uses the following language:

"When a person has been nominated to an office by the President, confirmed by the Senate, and his commission has been signed by the President * * * his appointment to that office is complete. Congress may provide, as it has been done in this case, that certain acts shall be done by the appointee before he shall enter on the
44 possession of the office under his appointment. These acts then become conditions precedent to the complete investiture of the office; but they are to be performed by the appointee, not by the Executive; all that the Executive can do to invest the person with his office has been completed when the commission has been signed and sealed; and when the person has performed the required conditions, his title to enter on the possession of the office is also complete. The transmission of the commission to the officer is not essential to his investiture of the office. If, by any inadvertence or accident, it should fail to reach him, his possession of the office is as lawful as if they were in his custody."

This decision is accordingly a reassertion of the point made in Marbury *v.* Madison, namely, that constitutional appointment is complete when the commission has been signed and sealed.

The rules under which the Senate proceeded, as herein pointed out, are not clear or unambiguous.

Can any other interpretation be given to the notification than that it was intended to inform the President that the Senate had discharged its constitutional function and had unconditionally approved the nomination, and that the President was free to discharge his constitutional function in the matter? It would be illogical to construe the Senate communication to the President as merely a message of encouragement, and to advise him of the fact that there actually had been a test vote and that a clear majority favored confirmation of the nominee. When it is reflected that

several months may elapse before the second day of actual executive session expires, it will be seen that unless the Senate meant the President to act upon its notification the sending of it was futile and even misleading. Constitutional theory, parliamentary usage, Senate rules, Senate precedents, and considerations of practical procedure alike lead to the conclusion in the instant case that when the Senate, in conformity with its own rules unanimously ordered notice of consent to be sent to the President, it once for all surrendered its control of the matter and its right to reconsideration and left the Executive free to make a constitutional appointment. When a commission was signed and sealed and, irrespective of the steps taken by the appointee to qualify, the President conferred upon him title to the office in question and of it he cannot be deprived unless removed by the President according to law.

Therefore the petition for a writ of quo warranto will be denied."

PEYTON GORDON (Sgd.),
Justice.

DECEMBER 5, 1931.

HISTORICAL SURVEY OF THE SENATE RULES RELATING TO RECONSIDERATION OF A VOTE CONFIRMING OR REJECTING A NOMINATION FROM THE BEGINNING TO THE PRESENT DATE

The Senate adopted its first set of rules on April 16, 1789. These rules contained no reference to reconsideration of a vote previously taken.

The first rule that provided for reconsideration by the Senate of its previous action was the Senate rule of February 25, 1790. On that day the Senate adopted the report of the committee appointed "to prepare and report a rule determining in what cases a reconsideration of a vote of the Senate shall be admissible, and resolved

"That, when a question has been once made and carried in the affirmative or negative, it shall be in order for any member of the majority to move for a reconsideration of it." (Annals of Congress, First Congress, p. 950.)

On January 27, 1792, the Senate in executive session

"Ordered, that the President of the United States be furnished with an authenticated transcript of the executive records of the Senate, from time to time.

"Ordered, that no executive business, in future, be published by the Secretary of the Senate." (Executive Journal, vol. 1, pp. 99–100.)

At various times subsequent to the adoption of the first reconsideration rule of 1790, the Senate appointed committees to revise its rules and to report to the Senate the amendments which in their opinion were necessary, and on March 26, 1806, the Senate adopted a report containing amendments to the then existing rules. (Annals of Congress, Ninth Congress, first session, pp. 201–204.)

Rules 21 and 38 of the rules adopted on March 26, 1806, outline the procedure for the reconsideration of any action previously taken. These rules are as follows:

(Rule 21) "When a question has been once made and carried in the affirmative or negative, it shall be in order for any member of the majority to move for the reconsideration thereof; but no motion for

the reconsideration of any vote shall be in order, after a bill, resolution, message, report, amendment, or motion, upon which a vote was taken, shall have gone out of the possession of the Senate, nor after the usual message shall have been sent from the Senate, announcing their decision; nor shall any motion for reconsideration be in order, unless made on the same day in which the vote was taken, or within the three next days of actual session of the Senate thereafter."

(Rule 38) "When any question may have been decided by the Senate, in which two-thirds of the members present are necessary to carry the affirmative, any member who votes on that side which prevailed in the question, may be at liberty to move for a reconsideration; and a motion for reconsideration shall be decided by a majority of votes."

The rule relating to furnishing the President with an authenticated transcript of the executive records of the Senate from time to time was amended on March 27, 1818. On that day the Senate in executive session adopted this resolution:

"*Resolved*, That in future, all nominations approved, or definitely acted on by the Senate, be by the Secretary returned to the President of the United States, from day to day, as such proceedings may occur, any rule or usage to the contrary notwithstanding." (Executive Journal, vol. 3, 1815–1829, p. 131.)

On January 3, 1820, the Senate amended rule 21 of the rules adopted on March 26, 1806, by deleting the phrase "nor after the usual message shall have been sent from the Senate" and the phrase "within the three next days of actual session of the Senate thereafter" and substituting in lieu of the latter phrase "within the two next days of actual session of the Senate thereafter.

48 Rule 21 of the rules of March 26, 1806, supra, was renumbered rule 19 by the rules adopted on January 3, 1820, and thereafter read as follows:

"When a question has been once made and carried, in the affirmative or negative, it shall be in order for any member of the majority to move for the reconsideration thereof; but no motion for the reconsideration of any vote shall be in order after a bill, resolution, message, report, amendment, or motion, upon which the vote was taken, shall have gone out of the possession of the Senate announcing their decision; nor shall any motion for reconsideration be in order, unless made on the same day on which the vote was taken, or within the two next days of actual session of the Senate thereafter." (Annals of Congress, Sixteenth Congress, first session, vol. 1, pp. 49-50.)

Rule 36 of the rules of March 26, 1806, was renumbered rule 35 by the rules of January 3, 1820.

The rule adopted March 27, 1818, providing that all nominations approved or definitely acted on by the Senate should be returned to the President from day to day as the proceedings occurred remained in force. But in addition, on January 5, 1829, the Senate adopted a resolution reading as follows:

"*Resolved*, That no paper, sent to the Senate by the President of the United States, or any executive officer, be returned, or delivered from the office of the Secretary, without an order of the Senate for that purpose." (Executive Journal, vol. 3, 1815–1829, pp. 621, 629.)

On February 18, 1843, the Senate adopted the following resolution:

"That nominations made by the President to the Senate, and which are neither approved nor rejected during the session at which

they are made, shall not be acted upon at any succeeding session without being again made by the President." (Executive Journal, vol. 6, 1841–1845, pp. 171–172.)

On April 6, 1867, the Senate rules relating to reconsideration of actions previously taken, were amended with respect to confirmation or rejection of a nomination. For the first time the Senate in its standing rules made a distinction between the conditions under which the reconsideration of a vote confirming or rejecting a nomination could be had and the reconsideration of other actions taken by the Senate. This was an amendment to rule 19, supra, and renumbered rule 20, which with the amendments, which are in italics, thereafter read as follows:

"20. When a question has been once made and carried in the affirmative or negative, it shall be in order for any member of the majority to move for the reconsideration thereof; but no motion for the reconsideration of any vote shall be in order after a bill, resolution, message, report, amendment, or motion upon which the vote was taken shall have gone out of the possession of the Senate, announcing their decision, *except a resolution confirming or rejecting a nomination by the President;* nor shall any motion for reconsideration be in order, unless made on the same day on which the vote was taken, or within the two next days of actual session of the Senate thereafter; *but a motion to reconsider a vote upon a nomination shall always, if the resolution announcing the decision of the Senate has been sent to the President, be accompanied by a motion requesting the President to return the same* to the Senate." (Executive Journal, vol. 15, part 2, p. 649.)

And on the same day the resolution adopted March 27, 1818, supra, was amended so that the words "from day to day as such proceedings may occur," was stricken out and the following substituted in lieu thereof; "On the next day after such action is had, unless otherwise ordered by the Senate." (Executed Journal, vol. 15, part 2, p. 649.) The amended rule became part of rule 43, which thereafter read;

"43. * * * all nominations approved or definitely acted on by the Senate shall be returned by the Secretary on the next day after such action is had, unless otherwise ordered by the Senate * * *."

On March 25, 1868, the Senate adopted a new set of standing rules. Under this revision rule 19, adopted January 3, 1820, as amended April 6, 1867, and renumbered rule 20, supra, read as follows:

"20. When a question has been made and carried in the affirmative or negative, *whether previously reconsidered or not*, it shall be in order for any Senator of the majority to move for the reconsideration thereof; but no motion for the reconsideration of any vote shall be in order after the bill, resolution, message, report, amendment, or motion upon which the vote was taken shall have gone out of the possession of the Senate, announcing their decision, except a resolution confirming or rejecting a nomination by the President; nor shall any motion for reconsideration be in order, unless made on the same day on which the vote was taken, or within the two next days of actual session of the Senate thereafter; but a motion to reconsider a vote upon a nomination shall always, if the resolution announcing the decision of the Senate has been sent to the President, be accompanied by a motion requesting the President to return the same to the

Senate. When any question may have been decided by the Senate, in which two-thirds of the Senators present are necessary to carry the affirmative any Senator who votes on that side which prevailed in the question may be at liberty to move for a reconsideration; and a motion for reconsideration shall be decided by a majority of votes. *But no motion to reconsider a vote upon a motion to reconsider shall be in order at any time.*" (Senate Journal, Fortieth Congress, second session, Ser. No. 1315, pp. 341, 342.)

The provisions in italics are new. The remaining provisions are merely a compilation of the provisions which appear in rule 21 adopted March 26, 1806, as amended January 3, 1820, and April 6, 1867, and in rule 38 of the rules adopted March 26, 1806, supra.

Rule 43 of the rules adopted March 25, 1868, contained modifications relating to the rule to return to the President nominations approved or definitely acted on, which rule read as follows:

"Nominations approved or definitely acted on by the Senate shall not be returned by the Secretary of the Senate to the President until the expiration of the time limited for making a motion to reconsider the same, or while a motion to reconsider is pending, unless otherwise ordered by the Senate. The President of the United States shall, from time to time, be furnished with an authenticated transcript of the executive records of the Senate, but no further extract from the Executive Journal shall be furnished, except original treaties, transmitted to the Senate by the President of the United States, or any executive officer, shall be returned or delivered from the office of the Secretary of the Senate, without an order of the Senate for that purpose." (Senate Journal, Fortieth Congress, second session, Ser. No. 1315, p. 346.)

The rules adopted March 25, 1868, also contained in rule 37 the following provisions:

"* * * Nominations neither approved nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made by the President; and if the Senate shall adjourn or take a recess for more than thirty
51 days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned to the President, and shall not be afterwards acted upon, unless again submitted to the Senate by the President; and all motions pending to reconsider a vote upon a nomination shall fall on such adjournment or recess; and the Secretary of the Senate shall thereupon make out and furnish to the heads of departments and other officers the list of nominations rejected or not confirmed, as required by law." (Senate Journal, ibid., p. 345.)

On January 7, 1877, the Senate adopted a new set of standing rules. These rules contained the following provisions relating to the confirmation or rejection of nominations and the reconsideration thereof, and also reconsideration of other previous actions of the Senate:

"20. When a question has once been decided by a vote of the Senate, whether that vote be determined by a majority or by two-thirds of the Senate, any Senator voting on that side which prevailed may enter a motion or move for a reconsideration thereof, at any time on the same day on which the vote was taken, or on either of

the next two days of actual session thereafter; and all motions to reconsider shall be decided by a majority of the Senate.

"When a bill, resolution, report, amendment, order, or message, upon which a vote has been taken, shall have gone out of the possession of the Senate and been communicated to the House of Representatives, the motion to reconsider such vote shall be accompanied by a motion to request the House to return the same to the Senate; which last motion shall be acted upon immediately, and determined without debate, and, when determined in the negative, shall be held to be a final disposition of the motion to reconsider.

* * * * * * * *

"21. If the Senate shall refuse to reconsider a vote, or if, upon the reconsideration of a vote, it shall reaffirm its first decision of the question, no further motion to reconsider shall be in order, unless by unanimous consent. And every motion to reconsider a vote taken upon any amendment or other question connected with a subject under consideration shall be decided at once, and a motion to reconsider may be laid on the table without affecting the question in reference to which the same may be made. And if carried, shall be held to be a final disposition of such motion.

* * * * * * * *

"72. When nominations shall be made by the President of the United States to the Senate, they shall, unless otherwise ordered by the Senate, be referred to appropriate committees, and the
52 final question on every nomination shall be, 'Will the Senate advise and consent to this nomination?' which question shall not be put on the same day on which the nomination is received, nor the day on which it may be reported by a committee, unless by unanimous consent of the Senate.

"73. All information communicated or remarks made by a Senator when acting upon nominations, concerning the character or qualifications of the person nominated, also all votes upon any nomination, shall be kept secret. If, however, charges shall be made against a person nominated, the committee may, in its discretion, notify such nominee thereof, but the name of the person making such charges shall not be disclosed. The fact that a nomination has been made, or that it has been confirmed or rejected, shall not be regarded as a secret.

"74. When a nomination is confirmed or rejected, any Senator voting in the majority may move for a reconsideration on the same day on which the vote was taken, or on either of the next two days of actual executive session of the Senate; but if a notification shall have been sent to the President before the expiration of the time within which a motion to reconsider may be made, the motion to reconsider shall be accompanied by a motion to request the President to return such notification to the Senate. Any motion to reconsider the vote on a nomination may be laid on the table without prejudice to the nomination, and shall be a final disposition of such motion.

"75. Nominations confirmed or rejected by the Senate shall not be returned by the Secretary to the President until the expiration of the time limited for making a motion to reconsider the same, or while a motion to reconsider is pending, unless otherwise ordered by the Senate.

"76. When the Senate shall adjourn or take a recess for more than thirty days, all motions to reconsider a vote upon a nomination which has been confirmed or rejected by the Senate, which shall be pending at the time of taking such adjournment or recess, shall fall; and the Secretary shall return all such nominations to the President as confirmed or rejected by the Senate as the case may be.

"77. Nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President; and if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall not again be considered unless they shall again be made to the Senate by the President.

53 "78. The President of the United States shall, from time to time, be furnished with an authenticated transcript of the executive records of the Senate, but no further extract from the Executive Journal shall be furnished, except by special order of the Senate; and no paper, except original treaties transmitted to the Senate by the President of the United States, and finally acted upon by the Senate, shall be delivered from the office of the Secretary without an order of the Senate for that purpose." (Senate Journal, Forty-fourth Congress, first session, Ser. No. 1717, pp. 116, 127, 128.)

The Senate on January 11, 1884, adopted a new set of standing rules effective January 21, 1884. In this revision the Committee on Rules merely compressed rules 72 to 77, inclusive, of the rules of January 7, 1877, into rule 38 and numbered each of these rules paragraphs 1 to 6, respectively. Rule 78 of the rules of January 7, 1877, was renumbered XXXIX. (Senate Journal, Forty-eighth Congress, first session, Ser. No. 2161, pp. 145–160.)

On January 18, 1929, the Senate amended paragraph 2 of Rule XXXVIII by providing that thereafter all business should be transacted in open session unless the Senate in closed session by a majority vote determined that a particular nomination should be considered in closed executive session. (Congressional Record, Seventy-first Congress, first session, vol. 71, part 3, pp. 3054, 3055.)

SENATE, WHITE HOUSE AND DEPARTMENTAL PRECEDENTS

INTRODUCTION

A list of precedents for the reconsideration by the Senate of its vote confirming or rejecting a nomination after the notification of the President of its action thereon was compiled in the legislative reference service of the Library of Congress at the request and with the cooperation of counsel for both parties in this cause. This list, printed in the form of a pamphlet entitled "Senate Precedents," was made part of the record of the Supreme Court of the District of Columbia. The information therein contained was supplemented by an agreement of counsel presenting additional facts disclosed by the registers of nominations or appointments at the executive offices of the White House and, in certain instances, by the records of the particular department concerned. This supplemental information was also made a part of the record of the Supreme Court of the District of Columbia by order of court. For the purpose of greater clarity and convenience, counsel for both parties have stipulated to combine the information contained in both of these documents.

In this compilation reference is made to three sources of information: the Senate Executive Journal, the records in the executive offices of the White House and the records of the department concerned.

1. The Senate Executive Journal.

The Senate Executive Journal contains the official record of proceedings of the United States Senate in executive session.
55 The material set forth under this heading is taken from the record contained in the published Executive Journals of the Senate from 1829 to 1901, and the Manuscript Journals from 1901 to date. Reliance has in general been placed on the indexes to these journals, on account of the length of time that would necessarily be consumed in a careful page-by-page reading of the journals themselves. For the most part the indexes are very complete and reliable, but in a few cases (chiefly during a part of the Civil War period) it was found necessary to supply gaps and correct inaccuracies in them. No attempt has been made to find precedents for the period prior to 1829, both because the indexes for that period are so constructed as to be of no use for the purpose, and because the discussion in the Hill case in 1830 would seem to imply that there were no precedents earlier than it. It has not been possible in every case to be certain whether or not the President was notified of the Senate's action; all cases have been included in the list of precedents, unless it seems reasonably certain that he was not so notified. Where it is stated that no subsequent proceedings are recorded in the journal the statement is based on the absence of notations in the indexes of the journal. In most cases where a yea and nay vote is recorded in the Executive Journals, the figures are given in the list, the affirmative vote being given first in each instance. References to the volume and page of the Executive Journals are given in parentheses in connection with each fact taken from these journals.

2. Records in executive offices of the White House

At the White House there are twenty bound volumes in which
56 records of nominations and appointments during the period March 4, 1869, to March 4, 1913, have been kept. With the exception of the two volumes beginning with March 4, 1869, which extend to March 4, 1877, each volume covers a period of four years; but for each period of four years there are two volumes. One of these volumes is labeled either "Register of Appointments made by the President—Diplomatic, Military, etc.," or "Register of Nominations made by the President—Diplomatic, Military, etc." This volume contains records of nominations and appointments which do not relate to some particular locality in the United States. The other volume is labeled either "Register of Appointments made by the President—States" or "Register of Nominations made by the President—States." This volume contains records of nominations and appointments relating to a particular State, such as postmasters, judges, United States attorneys, registers of land offices, etc. The volume labeled "States" and the volume labeled "Diplomatic, Military, etc.," are mutually exclusive; they supplement each other.

For each person recorded in these volumes spaces are provided for entries under the following headings: "Names of persons appointed" or "Name"; "Under which department" or "Department"; "Office to which appointed" or "Office"; "Locality of the office" (if any); "Nominated"; "Action of Senate" or "Confirmed"; "Date of commission" or "Commissioned" and "Remarks."

Beginning with March 4, 1913, the record of each nomination is kept on an individual card. These cards provide space for
57 entries under substantially the same headings as appear in the bound volumes described above.

Beginning with March 4, 1929, no record is kept on the cards of the date of commission with respect to postmasters. It should also be noted that no record is kept of certain minor appointments, such as assistant dental surgeons in the Navy, mentioned at page 105 of this compilation.

3. Departmental records

The records of the particular department to which an appointment appertains are referred to when deemed necessary or apposite.

There has also been inserted in this compilation at appropriate places the various rules adopted by the Senate from February 25, 1790, to the present date, in so far as these rules relate to the reconsideration of action previously taken by it, and more specifically to the reconsideration of action taken on a nomination. A detailed survey of these rules was presented by the Supreme Court of the District of Columbia in an appendix to its opinion.

Collection and preparation of the information contained in this pamphlet has been made possible through the efforts of Mr. Walter H. McClenon, of the legislative reference service, Library of Congress, Washington, D. C., Charles Poletti, Esq., 15 Broad Street, New York, N. Y., Erwin N. Griswold, Esq., Department of Justice, Wash-
58 ington, D. C., and Ernest Scott, Esq., 2225 Land Title Building, Philadelphia, Pa.

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ALEXANDER J. GROESBECK.
GEORGE WHARTON PEPPER.

59 RULES AND PRECEDENTS

RULES FROM 1790 TO 1843

On February 25, 1790, the Senate adopted the following rule (Senate Journal, vol. 1, 1789–1793, p. 116; Annals of Congress, First Congress, Gales, 1834 ed., p. 949):

"*Resolved*, That, when a question has been once made and carried in the affirmative or negative, it shall be in order for any member of the majority to move for a reconsideration of it."

On January 27, 1792, the Senate further (Executive Journal, vol. 1, 1789–1805, pp. 99–100)

"*Ordered*, That the President of the United States be furnished with an authenticated transcript of the executive records of the Senate, from time to time.

"*Ordered*, That no executive business, in future, be published by the Secretary of the Senate."

The following rules were adopted by the Senate March 26, 1806 (Senate Journal, vol. 4, 1805–1811, pp. 66, 68; Annals of Congress, Ninth Congress, first session, pp. 201–204):

[Rule 21] "When a question has been once made, and carried in the affirmative or negative, it shall be in order for any member of the majority to move for the reconsideration thereof; but no motion for the reconsideration of any vote shall be in order, after a bill, resolution, message, report, amendment, or motion, upon which the vote was taken, shall have gone out of possession of the Senate, nor after the usual message shall have been sent from the Senate, announcing their decision; nor shall any motion for reconsideration be in order unless made on the same day in which the vote was taken, or within the three next days of actual session of the Senate thereafter."

[Rule 38] "When any question may have been decided by the Senate, in which two-thirds of the members present are necessary to carry the affirmative, any member who votes on that side which prevailed in the question, may be at liberty to move for a reconsideration; and a motion for reconsideration shall be decided by a majority of votes."

On March 27, 1818, the Senate adopted the following resolution (Executive Journal, vol. 3, 1815–1829, p. 131):

"*Resolved*, That in future, all nominations approved, or definitively acted on by the Senate, be by the Secretary returned to the President of the United States, from day to day, as such proceedings may occur, any rule or usage to the contrary notwithstanding."

60 On January 3, 1820, the Senate renumbered its rules; rule 38 was left unchanged, but given the new number 35; rule 21 was renumbered 19 and changed to read (Senate Journal, 1819–1820, p. 63; Annals of Congress, Sixteenth Congress, first session, vol. 1, pp. 48–52):

"When a question has been once made and carried in the affirmative or negative, it shall be in order for any member of the majority to move for the reconsideration thereof; but no motion for the reconsideration of any vote shall be in order after a bill, resolution, message, report, amendment, or motion upon which the vote was taken, shall have gone out of the possession of the Senate, announcing their decision; nor shall any motion for reconsideration be in

order, unless made on the same day on which the vote was taken, or within the two next days of actual session of the Senate thereafter."[1]

On January 5, 1829, the Senate adopted the following resolution (Executive Journal, vol. 3, 1815–1839, pp. 621, 629):

"*Resolved*, That no paper, sent to the Senate by the President of the United States, or any executive officer, be returned, or delivered from the office of the Secretary, without an order of the Senate for that purpose."[2]

PRECEDENTS FROM 1830 TO 1843

61 Isaac Hill, Second Comptroller of the Treasury. Rejected, 15–33, April 12, 1830 (4:90).[3] Motion to reconsider unanimously held not in order April 14, because the President had been notified (4:93).

Edmund L. DuBarry, surgeon in Navy. Rejected April 4, 1842 (6:49). Return of resolution requested by Senate April 28 (6:61). Resolution returned by President May 3 (6:63; proceedings of May 9). Resolution rescinded and nomination confirmed July 15 (6:112).

Benjamin K. Pierce, lieutenant colonel, and Levi Whiting, major, in Army. Confirmed July 1, 1842 (6:99). Resolution rescinded and its return requested July 13 (6:107). [There is no record in the Journal as to any action by the President pursuant to this request.] Nominations again confirmed July 14 (6:110).

RESOLUTION OF FEBRUARY 18, 1843

On Feb. 18, 1843, the Senate adopted the following resolution (Executive Journal, 6:171):

"*Resolved*, That nominations made by the President to the Senate, and which are neither approved nor rejected during the session at which they are made, shall not be acted upon at any succeeding session without being again made by the President, and that such shall hereafter be the rule of the Senate."[4]

PRECEDENTS FROM 1843 TO APRIL 5, 1867

62 Isaac H. Wright, Navy agent at Boston. Confirmed Feb. 3, 1846 (7:41). Return of resolution requested Feb. 4 (7:43). The President replied, Feb. 5 (7:44):

"In pursuance with the request of the Senate in their resolution of the 4th instant, I 'return' herewith 'for their further action the resolution advising and consenting to the appointment of Isaac H. Wright as Navy agent at Boston.' It will be observed that the resolution of the Senate herewith returned contains the advice and consent of that body to the appointment of several other persons to other offices not embraced in their resolution of the 4th instant, and it being impossible to comply with the request of the Senate without communicating to them the whole resolution, I respectfully request that so far as it

[1] In "Rules for Conducting Business in the Senate of the United States, Washington, Wm. M. Belt, 1849," this rule is given without change as rule 28; no reference has however been found to the action of the Senate changing the numbering. The same publication gives as rule 44 what had been rule 38 in 1806 and rule 33 in 1828. In "Rules for Conducting Business in the Senate of the United States, Washington, A. O. P. Nicholson, Public Printer, 1868," rule 30 is given in the same form as in the 1849 publication; what had been rule 28, 38 or 44 (as above noted) was changed to rule 45. The resolution of 1818 quoted above does not appear to be included in the rules adopted in 1820, but it is included in the 1849 compilation as a part of rule 43, and in the 1868 compilation as a part of rule 42.

[2] In the 1849 compilation of Senate rules referred to above, this is incorporated as a part of rule 42; in the 1868 compilation, as a part of rule 43.

[3] This reference is to the volume and page, respectively, of the Executive Journal of the Senate. Similar references to other cases are to the same source.

[4] In the 1849 compilation referred to above, this is incorporated as a part of rule 36; in the 1868 compilation, as a part of rule 37.

relates to the other cases than that of Mr. Wright it may be returned to me.

JAMES K. POLK."

Resolution as to Wright reconsidered and nomination referred to Committee on Naval Affairs Feb. 5 (7:45). March 10, "Mr. Fairfield, from the Committee on Naval Affairs, to whom was
63 recommitted, on the 5th February, the nomination of Isaac H. Wright, reported." (7:53.) Nomination withdrawn May 28 (7:79).

Edwin R. Merrifield, second lieutenant in Army. Confirmed June 17, 1848 (7:431). Return of resolution requested June 26 (7:435). Resolution returned and reconsidered June 29 (7:437, 438). [No subsequent proceedings recorded in the Journal.]

Stephen W. Kearney, brevet major general; Henry S. Turner, brevet major; William H. Emory and William H. Warner, brevet captains, in Army. Confirmed June 27, 1848 (7:436). President requested June 28 "to return to the Senate the list of California brevets confirmed by the Senate on yesterday, the said brevets having been confirmed by mistake (mixed with others), and without having been read, and without having been reported for confirmation by the Military Committee" (7:437). List returned and reconsidered June 29 (7:437, 438). Nominations of Turner, Emory, and Warner confirmed July 8, but vote on Turner reconsidered same day (7:448). Nomination of Kearney confirmed, 32–14, Aug. 9 (7:473). [No subsequent proceedings as to Turner recorded in the Journal.]

James A. Patterson, Indian agent for California. Confirmed Feb. 27, 1856 (10:58). Return of resolution requested Feb. 29 (10:59). Resolution returned March 5 (10:62; proceedings of March 11). Reconsidered and recommitted March 11 (10:63). Reported and again confirmed April 18 (10:78).

Robert Burns, collector of customs at Passamaquoddy, Me. Confirmed Dec. 22, 1857 (10:278). Return of resolution requested Dec. 23 (10:278). Resolution returned, reconsidered, and recommitted Jan. 6, 1858 (10:280–281). Reported and again confirmed Feb. 10 (10:304).

William S. Rowland, consul at Riga. Confirmed March 3, 1858 (10:332). Return of resolution requested and motion to reconsider entered March 8 (10:337). Resolution returned March 10 (10:340). Motion to reconsider withdrawn April 7 (10:359).

64 James Simons, surgeon in Army. Confirmed, 28–15, March 5, 1859 (11:76). Motion to reconsider entered and return of resolution requested March 7 (11:79–80). Resolution returned March 8 (11:88). Motion to reconsider failed, 20–23, March 9 (11:93).

Ralph Gurnee, collector of customs at Sackett's Harbor, N. Y. Confirmed Feb. 1, 1861 (11:257). Motion to reconsider entered and return of resolution requested Feb. 6 (11:258). Resolution returned Feb. 7 (11:266; proceedings of Feb. 12). Reconsidered Feb. 12 (11:271). [Cornelius W. Inglehart nominated to same office March 28 (11:358).]

Christopher Gore Ripley, secretary of legation at Brussels. Confirmed March 16, 1861 (11:309). Motion to reconsider entered and

return of resolution requested March 18 (11:312). Resolution returned March 19 (11:314). Reconsidered and laid on table March 20 (11:319).

Elisha O. Crosby, minister resident to Guatemala. Confirmed March 22, 1861 (11:328). Motion to reconsider entered and return of resolution requested March 23 (11:337). Resolution returned March 25 (11:339). Motion to reconsider failed March 26 (11:350).

Scott W. Updike, deputy postmaster at Rochester, N. Y. Confirmed, 20–19, July 26, 1861 (11:485). Return of resolution requested and motion to reconsider entered July 27 (11:487). Resolution returned July 30 (11:489; proceedings of July 31). Motion to reconsider failed, 8–27, July 31 (11:497).

Daniel Evans, consul at Bilbao. Confirmed Jan. 22, 1862 (12:96). Return of resolution requested Jan. 24 (12:99). Resolution returned Jan. 25 (12:99; proceedings of Jan. 27). Resolution sent back to President March 3 (12:146).

John Tucker, Assistant Secretary of War. Confirmed Jan. 29, 1862 (12:104). Return of resolution requested and motion to reconsider entered Jan. 30 (12:105). Resolution returned Jan. 31 (12:106; proceedings of Feb. 3). [No subsequent proceedings recorded in the Journal.]

Charles Mundee, Assistant Adjutant General, and William H. Ritter, paymaster, in Army. Rejected March 6, 1862 (12:155). Return of resolution requested and motion to reconsider entered March 13 (12:162–163). Resolution returned March 18 (12:169). Resolutions reconsidered March 21 (12:179). [No subsequent proceedings recorded in the Journal.]

65 Fitz-John Porter, brigadier general of Volunteers. Confirmed March 7, 1862 (12:157). Return of resolution requested and motion to reconsider entered March 13 (12:163). Resolution returned March 18 (12:169). Motion to reconsider failed April 28 (12:270–271).

Max Einstein, consul at Nuremberg. Rejected March 19, 1862 (12:172). Return of resolution requested and motion to reconsider entered March 21 (12:178–179). [No subsequent proceedings recorded in the Journal.]

Thomas Clowes, postmaster at Troy, N. Y. Confirmed, 19–18, March 20, 1862 (12:175). Return of resolution requested and motion to reconsider entered March 21 (12:178). Resolution returned March 27 (12:194). Motion to reconsider failed, 15–21, June 12 (12:345).

Jefferson H. Nones, Assistant Adjutant General, and John K. Russell, assistant quartermaster, of Volunteers. Confirmed March 24, 1862 (12:183). Return of resolution requested and motion to reconsider entered March 26 (12:191). Resolution returned March 28 (12:196; proceedings of March 31). Motion to reconsider confirmation of Nones laid on table June 12 (12:346). [No subsequent proceedings in the case of Russell recorded in the Journal.]

Thomas B. Catlin, brigade surgeon of Volunteers. Confirmed April 4, 1862 (12:215). Return of resolution requested and motion to reconsider entered April 7 (12:222; name spelled "Kettle"). Resolution returned April 8 (12:223). Motion to reconsider laid on table June 12 (12:346).

Charles C. Lathrop, collector of customs at New Orleans. Confirmed May 1, 1862 (12:273). Return of resolution requested and motion to reconsider entered May 5 (12:281). Resolution returned, reconsidered and recommitted May 14 (12:287–288). [No subsequest proceedings recorded in the Journal.]

66 J. Napoleon Zerman, brigadier general of Volunteers. Confirmed May 5, 1862 (12:281). Return of resolution requested and motion to reconsider entered May 6 (12:282). Resolution returned May 12 (12:284). Reconsidered and nomination laid on the table June 12 (12:345–346). Nomination withdrawn June 18 (12:684).

Thomas P. Campbell and George Boal, assessors for 17th and 18th districts of Pennsylvania. Confirmed Feb. 3, 1863 (13:112, 113). Return of resolution requested and motion to reconsider entered Feb. 6 (13:117). Resolution returned and reconsidered Feb. 9 (13:122, 124). Rejected Feb. 19 (13:145).

A. L. Greer, assessor for fourth district of Kentucky. Confirmed Feb. 3, 1863 (13:112, 113). Return of resolution requested Feb. 9 (13:123). Resolution returned Feb. 12 (13:127). Reconsidered Feb. 18 (13:144). Rejected Feb. 19 (13:145).

James L. Cramer, additional paymaster of Volunteers. Confirmed Feb. 19, 1863 (13:146, 150). Return of resolution requested Feb. 21 (13:159). Resolution returned Feb. 24 (13:163; proceedings of Feb. 25). [No subsequent proceedings recorded in the Journal.]

Charles A. Henry, assistant quartermaster of Volunteers. Confirmed Feb. 27, 1863 (13:199). Return of resolution requested and motion to reconsider entered March 3 (13:200). Resolution returned March 6 (13:221) to special session of the Senate, 38th Congress. [No subsequent proceedings recorded in the Journal.]

John F. Reynolds, George Sykes, and Abner Doubleday, major generals of Volunteers. Confirmed March 9, 1863 (13:261, 262). Return of resolution requested and motion to reconsider entered March 10 (13:274). Motions to reconsider withdrawn March 11 (13:281).

67 Charles K. Graham, brigadier general of Volunteers. Confirmed March 9, 1863 (13:262). Return of resolution requested and motion to reconsider entered March 10 (13:274). [Resolution probably returned by President March 11; see 13:279.] Resolution sent back to President March 11 (13:280).

Frank Wheaton, brigadier general of Volunteers. Confirmed March 9, 1863 (13:262). Return of resolution requested and motion to reconsider entered March 10 (13:274). Motion to reconsider withdrawn March 12 (13:295).

Waldemeier Krzyzanowski, brigadier general of Volunteers. Confirmed March 9, 1863 (13:262). Return of resolution requested and motion to reconsider entered March 11 (13:281). Resolution returned March 12 (13:289). Reconsidered and laid on table March 13 (13:306).

Gordon Granger, major general of Volunteers. Confirmed March 11, 1863 (13:281, 283). Return of resolution requested and motion to reconsider entered March 13 (13:310). Resolution returned March 13 (13:308). [No subsequent proceedings recorded in the Journal.]

William C. Bailey, assistant quartermaster with rank of captain. Confirmed March 11, 1863 (13:282, 283). Resolution returned "according to the request of the Senate" March 13 (13:308). Resolution reconsidered and nomination rejected March 13 (13:310).

Henry H. Sibley, brigadier general of Volunteers. Rejected, 17–21, March 11, 1863 (13:283). Return of resolution requested and motion to reconsider entered March 12 (13:298). Resolution returned March 12 (13:298; proceedings of March 13). Reconsidered March 13 (13:310). [No subsequent proceedings during the special session recorded in the Journal.] Renominated Dec. 31 (13:349; proceedings of Jan. 7, 1864). Confirmed, 22–14, March 22, 1864 (13:457). Return of resolution requested and motion to reconsider entered March 23 (13:458). Resolution returned March 25 (13:459). Reconsidered and sent back to President with request for modification March 25 (13:461). Renominated March 28 (13:464; proceedings of March 30). Confirmed again April 7 (13:479).

68 Hector Tyndale, brigadier general of Volunteers. Rejected March 11, 1863 (13:283). Return of resolution requested and motion to reconsider entered March 13 (13:306). Resolution returned and reconsidered and nomination confirmed March 13 (13:308, 310).

Paul B. Goddard, surgeon of Volunteers. Confirmed March 12, 1863 (13:296). Return of resolution requested and motion to reconsider entered March 13 (13:308). [No subsequent proceedings recorded in the Journal.]

James Cull, Hillary C. Spalding, and Thomas I. Williams, justices of the peace for Washington County, D. C. Rejected March 12, 1863 (13:296). Return of resolution requested and motions to reconsider entered March 13 (13:302). Resolution returned March 13 (13:307). Resolution as to Williams reconsidered and nomination confirmed March 14 (13:312). [No subsequent proceedings as to Spalding are recorded in the Journal, but Cull was renominated Jan. 5, 1864 (13:325; proceedings of Jan. 7); referred to Committee on District of Columbia Jan. 7 (13:364).

Thomas C. Donn, justice of the peace for Washington County, D. C. Rejected March 12, 1863 (13:296). Return of resolution requested, motion to reconsider entered, and resolution returned March 14 (13:312). [No subsequent proceedings during the special session recorded in the Journal.] Renominated Jan. 12 (?), 1864 (13:369; proceedings of Jan. 11). Referred to Committee on District of Columbia Jan. 11 (13:370). [No subsequent proceedings recorded in the Journal.]

Alfred W. Ellett, brigadier general of Volunteers. Rejected, return of resolution requested, and motion to reconsider entered March 12, 1863 (13:296). Resolution returned March 12 (13:299; proceedings of March 13). Reconsidered and confirmed, 24–11, March 13 (13:306–307).

Andrew Wylie, Justice of Supreme Court of District of Columbia. Confirmed, 24–13, March 12, 1863 (13:297). Return of resolution requested and motion to reconsider entered March 13 (13:302–303). Resolution returned and reconsidered March 13 (13:307, 308). Recess appointment given March 18, 1863 (13:325; proceedings of Jan. 7, 1864).

69 Horatio G. Wright, major general of Volunteers. Rejected, 15–20, March 12, 1863 (13:297). Return of resolution requested, motion to reconsider entered, and resolution returned March 13 (13:308, 310). [A new nomination made May 10, 1864, was confirmed May 12 (13:539–540).]

Orsamus H. Irish, superintendent of Indian affairs for Utah. Confirmed Feb. 2, 1864 (13:389). Return of resolution requested and motion to reconsider entered Feb. 4 (13:390–391). Resolution returned Feb. 9 (13:393; proceedings of Feb. 10). Motion to reconsider withdrawn Feb. 17 (13:407).

Ralph S. Dorr, receiver of public moneys for San Francisco land district. Confirmed Feb. 3, 1864 (13:390). Return of resolution requested and motion to reconsider entered Feb. 4 (13:391). Resolution returned Feb. 9 (13:393; proceedings of Feb. 10). Reconsidered and recommitted Feb. 10 (13:401). Reported and again confirmed Feb. 17 (13:405).

Allen McKane, paymaster of Volunteers. Confirmed Feb. 23, 1864 (13:416). Return of resolution requested and motion to reconsider entered Feb. 26 (13:424). [No subsequent proceedings recorded in the Journal.]

Frederick Baggs, assistant quartermaster of Volunteers. Confirmed Feb. 29, 1864 (13:429). Nomination withdrawn Feb. 29 (13:430; proceedings of March 1); message referred to Committee on Military Affairs and the Militia March 1 (13:431). Return of resolution requested and motion to reconsider entered March 1 (13:431). [No subsequent proceedings recorded in the Journal.]

Henry Denlinger, collector of internal revenue for Oregon. Confirmed March 2, 1864 (13:433). Return of resolution requested and motion to reconsider entered March 7 (13:434). Resolution returned March 9 (13:441). Motion to reconsider withdrawn March 15 (13:444). Nomination withdrawn and Medoram Crawford nominated to same office April 28 (13:508; proceedings of May 4). Crawford confirmed May 7 (13:525).

70 Joseph K. Barnes, medical inspector general. Confirmed March 2, 1864 (13:433). Return of resolution requested and motion to reconsider entered March 7 (13:434). The President replied March 10 (13:442; proceedings of March 15):

"In compliance with a resolution of the Senate dated March 2d, 1864, I return to the Senate the resolution advising and consenting to the appointment of Medical Inspector Joseph K. Barnes to be medical inspector general with the rank of colonel, in the Army of the United States, August 10, 1863, vice Perley, resigned.

"The following indorsement by the honorable Secretary of War will be found upon the resolution:

"'The within resolution was transmitted by the President to the War Department on the third day of March.

"'The commission of Surgeon Barnes (and others confirmed) was on the 3d made out and executed, and his was delivered on the fifth day of March to Surgeon Barnes.

"'EDWIN M. STANTON,
"'*Sec. of War.*

"'WAR DEPARTMENT, *March* 10, 1864.'

"To which I respectfully call the attention of the Senate.

"ABRAHAM LINCOLN."

"On motion by Mr. Johnson he had leave to withdraw his motion, submitted the 7th March, that the resolution advising and consenting to the appointment of Joseph K. Barnes be reconsidered." (13:541; May 12.)

Granville E. Johnson, aide-de-camp with rank of major. Confirmed March 8, 1864 (13:439). Return of resolution requested and motion to reconsider entered March 9 (13:441). Resolution returned March 14 (13:443; proceedings of March 15): [No subsequent proceedings recorded in the Journal.]

71 Henry B. Seely, lieutenant commander in Navy. Confirmed March 18, 1864 (13:448). Return of resolution requested and motion to reconsider entered March 21 (13:454). Resolution returned March 24 (13:458; proceedings of March 25). Nomination returned to President April 1 (13:448, 470) on the ground that the grade was "already full, as provided by law," so as to leave no vacancy to which Seely "can be legally appointed." Renominated April 5 (13:477; proceedings of April 7). Nomination returned to President May 7 (13:526).

Walter Abbot, La Rue P. Adams, Albert S. Barker, J. R. Bartlett, jr., O. A. Batcheller, Charles C. (or F.) and Henry J. Blake, William R. Bridgman, George M. Brown, Richard S. Chew, Charles S. Cotton (or Colton), H. T. French, Gouverneur K. Haswell, Edward C. Hazeltine, H. L. Johnson, Charles D. Jones, E. N. Kellogg, A. H. McCormick, Morrill Miller, F. J. Naile, F. Pearson, John H. and John J. Read, H. B. Rumsey, M. W. Sanders, Silas W. Terry, C. W. Tracy, James Wallace, D. D. Wemple, and G. W. Wood, lieutenants; Charles Green, captain; Asaph Hall and William Harkness, professors of mathematics; and Caspar Schenck, paymaster in Navy. Confirmed March 18, 1864 (13:448). Return of resolution requested March 23 (13:458). Resolution returned March 28 (13:463; proceedings of March 30). [No further proceedings as to Hazeltine or Wallace apparently recorded in Journal; but see 13:905, 1245.] Green renominated April 5 (13:477; proceedings of April 7), and confirmed April 20 (13:498). Henry J. Blake and Chew renominated June 14 (13:588; proceedings of June 16) and confirmed June 30 (13:637, 641). All the others were renominated April 5 (13:478; proceedings of April 7) and confirmed April 21 (13:500).

C. M. Levy, assistant quartermaster of volunteers. Confirmed March 18, 1864 (13:449, 451). Return of resolution requested and motion to reconsider entered March 21 (13:454). Resolution returned March 24 (13:458; proceedings of March 25). Recommitted April 20 (13:498). [No subsequent proceedings recorded in the Journal.]

A. McDonald Lyon, paymaster in Army. Rejected, 6–32, March 22, 1864 (13:456). Return of resolution requested and motion to reconsider entered March 25 (13:460). Resolution returned March 29 (13:464; proceedings of March 30). [No subsequent proceedings recorded in the Journal.]

72 Marcus W. McCracken, commissary of subsistence in Volunteer Army. Confirmed April 7, 1864 (13:480). Return of resolution requested and motion to reconsider entered April 14 (13:490). Resolution returned April 18 (13:495). Motion to reconsider withdrawn May 4 (13:521).

Elisha H. Ludington, assistant inspector general of Army. Confirmed April 20, 1864 (13:498). Return of resolution requested and motion to reconsider entered April 21 (13:500). Resolution returned

April 23 (13:501; proceedings of April 27). Motion to reconsider withdrawn May 7 (13:526).

John H. Goddard, justice of the peace for Washington County, D. C. Confirmed May 18, 1864 (13:550, 551). Return of resolution requested and motion to reconsider entered June 7 (13:577). The President replied June 25 (13:625; proceedings of June 27):

"I have the honor to acknowledge the receipt of the resolution of the Senate, dated the 7th of June, requesting me to return to the Senate the resolution advising and consenting to the appointment of John H. Goddard to be justice of the peace in and for the county of Washington, and District of Columbia; and to state that on the 19th of May last, the resolution was sent to the Department of State, and a commission in accordance therewith issued to Mr. Goddard on the same day, the appointment being thus perfected, and the resolution becoming a part of the permanent records of the Department of State.

ABRAHAM LINCOLN."

[No subsequent proceedings recorded in the Journal.]

George E. Seney, paymaster of Volunteers. Confirmed May 28, 1864 (13:565). Return of resolution requested and motion to reconsider entered June 7 (13:577). Resolution returned June 11 (13:579; proceedings of June 13). Reconsidered and recommitted June 13 (13:587). Rejected June 30 (13:641).

John Edwards, brigadier general of Volunteers. Confirmed Feb. 14, 1865 (14:163, 167). Return of resolution requested and motion to reconsider entered Feb. 20 (14:176). Resolution returned Feb. 23 (14:194). [No subsequent proceedings recorded in the Journal.]

73 William P. Benton, collector of internal revenue for first district of Alabama. Confirmed Feb. 15, 1866 (14:561). Return of resolution requested and motion to reconsider entered Feb. 16 (14:561). Motion to reconsider withdrawn March 6 (14:587).

Benjamin F. Fisher, chief signal officer of Volunteers. Confirmed Feb. 23, 1866 (14:577). Return of resolution requested and motion to reconsider entered March 8 (14:591). Resolution returned March 9 (14:660; proceedings of March 12). Reconsidered and recommitted March 12 (14:660). Nomination subsequently withdrawn (14:1357).

W. Bonifant, marshal for district of Maryland. Rejected, 17–17, March 6, 1866 (14:587). Return of resolution requested and motion to reconsider entered March 8 (14:592). Resolution returned March 10 (14:659; proceedings of March 12). Reconsidered and confirmed March 12 (14:660).

George A. Benedict, deputy postmaster at Cleveland. Confirmed March 12, 1866 (14:661). Return of resolution requested and motion to reconsider entered March 16 (14:677). Resolution returned March 19 (14:690; proceedings of March 21). Motion to reconsider withdrawn April 26 (14:755).

Francis W. Sykes, direct tax commissioner for district of Alabama. Confirmed March 12, 1866 (14:661). Return of resolution requested and motion to reconsider entered March 16 (14:678). Resolution returned March 19 (14:690; proceedings of March 21). Reconsidered and recommitted March 21 (14:691). Reported adversely and again rejected April 10 (14:716).

Edward T. Parker, surveyor of customs at New Orleans. Rejected March 12, 1866 (14:661). Return of resolution requested and

motion to reconsider entered March 16 (14:678). Resolution returned March 19 (14:689; proceedings of March 21). Reconsidered and recommitted March 21 (14:691). Reported adversely April 23 (14:752). Confirmed May 2 (14:777).

John V. L. Findlay, collector of internal revenue for third district of Maryland. Rejected, 11–20, March 14, 1866 (14:677). Return of resolution requested and motion to reconsider entered March 16 (14:678–679). Resolution returned March 19 (14:690; proceedings of March 21). Motion to reconsider failed May 2 (14:777).

74 Edmund Murphy, assessor of internal revenue for first district of Louisiana. Rejected March 21, 1866 (14:690). Return of resolution requested and motion to reconsider entered March 22 (14:694). Resolution returned March 26 (14:696; proceedings of April 10). Motion to reconsider laid on table April 10 (14:717).

Bela P. Learned, second lieutenant in Army. Confirmed March 21, 1866 (14:691; see 14:648, 660). Return of resolution requested and and motion to reconsider entered March 22 (14:694). Resolution returned March 27 (14:696; proceedings of April 10). Reconsidered April 10 (14:717). Nomination withdrawn April 21 (14:750; proceedings of April 23).

Numerous brevet appointments in the Army were confirmed May 4, 1866 (14:781); return of resolution requested and motion to reconsider entered May 10 (14:808); resolution returned May 17 (14:820; proceedings of May 18); reconsidered and recommitted May 18 (14:823); nominations returned to President with request for modification June 27 (14:874); reported favorably July 13 (14:920); again confirmed July 14 (14:967–968). [It is not clear from the Journal whether or not any modification in the nominations had meanwhile been made, the names not being very clearly indicated.] In the case of James B. Fry, brevet major general, the return of the resolution of confirmation was requested and motion to reconsider entered July 19 (14:989–990); the resolution was returned July 23 (14:1043); the motion to reconsider failed July 28 (14:1175).

Albert B. Sloanaker, collector of internal revenue for first district of Pennsylvania. Confirmed May 14, 1866 (14:812, 813). Return of resolution requested and motion to reconsider entered May 15 (14:814). Resolution returned May 16 (14:820; proceedings of May 18). Reconsidered June 26 (14:872). Confirmed again July 5 (14:888). [The Journal does not indicate whether or not the President was ever notified of this confirmation.] Reconsidered, 16–13, and rejected July 10 (14:906–907). Return of resolution of rejection requested and motion to reconsider entered July 12 (14:908). Resolution returned July 14 (14:966). Motion to reconsider failed July 26 (14:1159–60).

75 John T. Tanner, collector of internal revenue for third district of Alabama. Confirmed May 23, 1866 (14:831). Return of resolution requested and motion to reconsider entered May 28 (14:833). Resolution returned May 31(?) (14:839; proceedings of May 30). Nomination recommitted May 30 (14:839). Reported favorably July 26 (14:1157). [The sequel is indicated by the following message of Jan. 2, 1867 (15:78):

"I nominate John T. Tanner to be collector of internal revenue, 3rd district of Alabama, he having been nominated to the Senate

in 1865,* confirmed by the Senate and the same recalled and no further action had upon the same. He was recommissioned during the recess of the Senate in 1866.

ANDREW JOHNSON."]

John H. Bryant, collector of internal revenue for fifth district of Illinois. Confirmed May 30, 1866 (14:841). Return of resolution requested June 4 (14:848). Resolution returned June 6 (14:850; proceedings of June 11). Motion to reconsider failed July 26 (14:1157).

Louis J. Czapkay, consul at Bucharest. Confirmed June 20, 1866 (14:868). Return of resolution requested and motion to reconsider entered June 26 (14:872). Resolution returned June 27 (14:880; proceedings of June 28). Reconsidered and recommitted July 10 (14:906). Reported without recommendation July 19 (14:988). Confirmed July 26 (14:1157–58).

Robert Clark, assessor of internal revenue for thirteenth district of Pennsylvania. Confirmed June 26, 1866 (14:872). Return of resolution requested and motion to reconsider entered June 27 (14:875). Resolution returned and motion to reconsider failed July 3 (14:886).

William G. McCandless, collector of internal revenue for twenty-third district of Pennsylvania. Confirmed, 23–9, July 13, 1866 (14:921). Return of resolution requested and motion to reconsider entered July 14 (14:967). Resolution returned July 17 (14:987; proceedings of July 19). Renominated Jan. 2, 1867 (15:80; proceedings of Jan. 14). Rejected Feb. 21 (15:239–240).

76 Leonard A. Harris and Samuel F. Cary, collectors of internal revenue for first and second districts of Ohio. Confirmed July 13, 1866 (14:921). Return of resolution requested and motion to reconsider entered July 14 (14:967). Resolution returned July 17 (14:987; proceedings of July 19). Motion to reconsider withdrawn July 23 (14:1044).

Joseph S. Wilson, Commissioner of General Land Office. Confirmed July 25, 1866 (14:1051). Return of resolution requested and motion to reconsider entered July 26 (14:1156). Resolution returned July 27 (14:1165). Reconsidered and nomination laid on table, 22–13, July 27 (14:1168). Nomination recommitted, 16–10, July 28 (14:1175). The President sent this message, Dec. 19 (15:58; proceedings of Dec. 20):

"I nominate Joseph S. Wilson, of the District of Columbia, who was commissioned during the recess of the Senate, to be Commissioner of the General Land Office."

George W. Rogers, postmaster at West Meriden, Conn. Confirmed July 25, 1866 (14:1051). Return of resolution requested and motion to reconsider entered July 26 (14:1159). Resolution returned and motion to reconsider failed July 27 (14:1167, 1168).

E. L. Cockrill and John M. Duke, collectors of internal revenue for eighth and ninth districts of Kentucky. Rejected Jan. 22, 1867 (15:136–137). Return of resolutions requested and motions to reconsider entered Jan. 26 (15:138). Resolutions returned Jan. 29 (15:139; proceedings of Feb. 1). Reconsidered and recommitted Feb. 1 (15:157). Reported adversely Feb. 6 (15:179). Both again rejected

*I. e., 1866.

Feb. 21 (15:239–240). Motion to reconsider rejection of Duke failed, 7–29, Feb. 23 (15:245–246).

William C. Binney, assessor of internal revenue for fifth district of Massachusetts. Confirmed Jan. 26, 1867 (15:139). Return of resolution requested and motion to reconsider entered Feb. 1 (15:157). Resolution returned Feb. 6 (15:177). Reconsidered and recommitted Feb. 21 (15:241). Reported adversely Feb. 23 (15:244). Rejected March 1 (15:281).

77 Basset Langdon, assessor of internal revenue for first district of Ohio. Rejected Jan. 26, 1867 (15:139). Return of resolution requested and motion to reconsider entered Feb. 1 (15:157). Resolution returned Feb. 5 (15:174; proceedings of Feb. 6). Motion to reconsider withdrawn, and resolution of rejection sent back to President Feb. 6 (15:178).

M. H. Beaumont, collector of customs at Perth Amboy, N. J. Rejected Jan. 26, 1867 (15:139). Return of resolution requested and motion to reconsider entered Feb. 1 (15:157). Resolution returned Feb. 5 (15:174; proceedings of Feb. 6). [No subsequent proceedings recorded in the Journal.]

William M. Fitzhugh, assessor of internal revenue for seventh district of Virginia. Confirmed Jan. 26, 1867 (15:139). Return of resolution requested and motion to reconsider entered Feb. 1 (15:156–157). Resolution returned Feb. 6 (15:177). Motion to reconsider failed Feb. 21 (15:241).

John W. Boyle, associate justice of Supreme Court of Dakota Territory. Confirmed Jan. 26, 1867 (15:139). Return of resolution requested and motion to reconsider entered Feb. 1 (15:157). Resolution returned Feb. 7 (15:182; proceedings of Feb. 8). Nomination reported favorably by the Committee on the Judiciary to which it "was recommitted, the 2d instant," Feb. 23 (15:245). Confirmed March 1 (15:280, 281).

Thomas W. Egan, collector of internal revenue for ninth district of New York. Rejected Jan. 26, 1867 (15:139). Return of resolution requested and motion to reconsider entered Feb. 6 (15:178). Resolution returned Feb. 8 (15:197; proceedings of Feb. 9). Motion to reconsider withdrawn Feb. 18 (15:208).

78 H. H. Heath, secretary of Territory of New Mexico. Confirmed Feb. 1, 1867 (15:156). Return of resolution requested and motion to reconsider entered Feb. 6 (15:178). The President replied Feb. 8 (15:197; proceedings of Feb. 9):

"I transmit a report from the Secretary of State in answer to the resolution of the Senate of the 6th instant, requesting the return of their resolution of the 1st instant, confirming the nomination of H. H. Heath as secretary of the Territory of New Mexico.

ANDREW JOHNSON.

"WASHINGTON, 8th *February*, 1867.

DEPARTMENT OF STATE,
Washington, February 8th, 1867.

"The Secretary of State, to whom was referred the resolution of the Senate of the 6th instant, requesting 'the President of the United States to return to the Senate the resolution of the 1st instant advising and consenting to the appointment of H. H. Heath to be secretary of

the Territory of New Mexico,' has the honor to state that the resolution referred to was received at this department on the 4th instant, that the commission was made out and sent to the Executive Mansion for signature, and has not been returned. The resolution of the 1st instant is herewith inclosed.

Respectfully submitted.

WILLIAM H. SEWARD."

Benjamin F. Coates, collector of internal revenue for eleventh district of Ohio. Rejected Feb. 6, 1867 (15:180). Return of resolution requested and motion to reconsider entered Feb. 9 (15:198). Resolution returned Feb. 12 (15:204; proceedings of Feb. 13). Reconsidered and confirmed Feb. 25 (15:268).

John A. Turley, assessor of internal revenue for eleventh district of Ohio. Rejected Feb. 8, 1867 (15:189). Return of resolution requested and motion to reconsider entered Feb. 9 (15:198). Resolution returned Feb. 12 (15:204; proceedings of Feb. 13). Motion to reconsider withdrawn Feb. 25 (15:268).

William Boardman, collector of internal revenue for seventh district of New York. Rejected Feb. 8, 1867 (15:189). Return of resolution requested and motion to reconsider entered Feb. 13 (15:205). Resolution returned Feb. 15 (15:207; proceedings of Feb. 18). Motion to reconsider withdrawn Feb. 18 (15:209).

79 William Byers, superintendent of Indian affairs for southern superintendency. Rejected Feb. 21, 1867 (15:239, 240). Resolution returned, "in compliance with the request of the Senate of the 23d instant," Feb. 26 (15:274; proceedings of Feb. 27). [James Wortham nominated March 13 (15:434) "vice William Byers, rejected."]

Lewis S. Hills, deputy postmaster at Salt Lake City. Rejected Feb. 21, 1867 (15:239, 240). Return of resolution requested Feb. 23 (15:245). Resolution returned Feb. 26 (15:274; proceedings of Feb. 27). [Anthony W. Street nominated March 16 (15:464) "in place of Lewis S. Hills, rejected by the Senate."]

Durbin Ward, United States attorney for Southern District of Ohio. Confirmed Feb. 21, 1867 (15:240). Return of resolution requested Feb. 23 (15:245). Resolution returned Feb. 26 (15:274; proceedings of Feb. 27). [No subsequent proceedings recorded in the Journal.]

Benjamin N. Bugby, assessor of internal revenue for fourth district of California. Confirmed Feb. 21, 1867 (15:240). Return of resolution requested Feb. 23 (15:245). Resolution returned Feb. 26 (15:274; proceedings of Feb. 27). Nomination withdrawn March 2 (15:283).

Eli P. Norton, solicitor for United States before Court of Claims. Confirmed Feb. 21, 1867 (15:240). Return of resolution requested Feb. 25 (15:268). Resolution returned March 2 (15:283). Motion to reconsider failed March 2 (15:336).

Numerous brevet appointments in the Army were confirmed Feb. 23, 1867 (15:246); return of resolutions requested Feb. 25 (15:268); resolutions returned March 1 (15:283; proceedings of March 2); reconsidered and recommitted March 2 (15:328); reported favorably and again confirmed March 2 (15:337).

Henry A. Starr, deputy postmaster at Milwaukee. Confirmed Feb. 23, 1867 (15:246). Return of resolution requested Feb. 25

(15:268). Resolution returned Feb. 28 (15:284; proceedings of March 2). Resolution sent back to President March 2 (15:339).

Westley Frost, assessor of internal revenue for twenty-first
80 district of Pennsylvania. Confirmed Feb. 23, 1867 (15:246). Return of resolution requested Feb. 27 (15:277). The President replied March 2 (15:284):

"I herewith transmit a report from the Secretary of the Treasury, in answer to the resolution of the Senate of 27th ult., requesting the return of their resolution of the 23d ult., consenting to the appointment of Westley Frost as assessor of internal revenue 21st district of Pennsylvania.

ANDREW JOHNSON.

WASHINGTON, *March* 2, 1867.

TREASURY DEPARTMENT, *March 1st*, 1867.

"Sir: I have to acknowledge the receipt of Senate resolution of the 17th ult., requesting return of the resolution of the 23d ult. consenting to the appointment of Westley Frost as assessor of int. rev. 21st district of Penn'a. I have to inform you that Mr. Frost qualified for the office and received his commission (with instructions to enter upon the duties at once) on the 26th ult.

"I am, very respectfully,

H. MCCULLOCH,
Secretary of the Treasury.

The PRESIDENT."

Senator Sherman submitted the following resolution March 25 (15:519):

"Whereas it appearing that on the 27th day of February last the Senate recalled its action on the nomination of Wesley Frost as assessor of the 21st district of Penna., and that he did not take the oath of office until the 2d day of March: Therefore

"*Resolved*, That the Secretary of the Treasury recall the commission of the said Frost until the action of the Senate upon his nomination."

Senator Sherman submitted another resolution April 1 (15:591) as follows:

"*Resolved*, That the Secretary of the Treasury be requested to recall the commission issued to Wesley Frost as assessor of internal revenue for the 21st district of Pennsylvania, it appearing that his confirmation was recalled before he received such commission or was sworn into office; and that the President be requested to return to the Senate the action of the Senate in the appointment of said Wesley Frost."

This resolution was rejected the same day, 14–23 (15:591).

81 Quincy D. Whitman, assessor of internal revenue for sixth district of Illinois. Rejected Feb. 23, 1867 (15:246, 247). Return of resolution requested Feb. 25 (15:268). Resolution returned March 1 (15:284; proceedings of March 2). Reconsidered and again rejected March 2 (15:329, 338).

Linus B. Birdsay, deputy postmaster at Meriden, Conn. Rejected Feb. 23, 1867 (15:247). Return of resolution requested Feb. 25 (15:268). Resolution returned March 2 (15:326). Reconsidered and confirmed March 2 (15:329).

Hampton B. Denman, superintendent of Indian affairs for northern superintendency. Confirmed Feb. 25, 1867 (15:268). Return of resolution requested, on motion of Senator Wade, Feb. 27 (15:277). Resolution returned March 1 (15:284; proceedings of March 2).

Resolution, on motion of Senator Wade, sent back to President March 2 (15:335).

James B. Carpenter, collector of customs at Cape Vincent, N. Y. Rejected Feb. 25, 1867 (15:268). Return of resolution requested Feb. 27 (15:277). Resolution returned March 1 (15:284; proceedings of March 2). Reconsidered and confirmed March 2 (15:328).

James W. Black, collector of internal revenue for sixth district of Missouri. Confirmed Feb. 27, 1867 (15:Index XXIX, CCXXIX). Return of resolution requested March 2 (15:329). Resolution returned March 2 (15:325). Resolution reconsidered March 2 (15:339). [The President sent the following message March 11 (15:412, proceedings of March 12):

"I nominate James W. Black to be collector of internal revenue 6th district of Missouri, appointed during the recess of the Senate in 1866, in place of Wm. A. Price, removed, nominated to the Senate during its last—confirmed—reconsidered, and no final action taken."]

Albert Zeiber, marshal for district of Oregon. Confirmed March 1, 1867 (15:280, 281). Return of resolution requested March 2 (15:333). Resolution returned March 2 (15:325). [No subsequent proceedings recorded in the Journal.]

James C. Coolidge, postmaster at Warsaw, Ill. Rejected March 1, 1867 (15:281). Return of resolution requested March 2 (15:329). Resolution returned March 2 (15:326). Reconsidered and confirmed March 2 (15:333).

82 James H. Chamberlain, assessor of internal revenue for fifth district of Maine. Confirmed March 2, 1867 (15:327, 328). Resolution returned, "agreeably to the request of the Senate of this date," March 2 (15:325). Reconsidered and recommitted March 2 (15:335). [No subsequent proceedings recorded in the Journal.]

S. L. Warren, United States attorney for Western District of Tennessee. Rejected March 2, 1867 (15:328). Resolution returned, "in compliance with the request of the Senate of this date," March 2 (15:325). Reconsidered and nomination laid on table March 2 (15:335).

William Allen, collector of internal revenue for ninth district of New York. Confirmed March 2, 1867 (15:332). Resolution returned, "in compliance with the request of the Senate of this date," March 2 (15:325). Resolution reconsidered March 2 (15:336). Renominated April 9 (15:677; proceedings of April 10). Nomination withdrawn April 19 (15:763).

John W. Frazier, assessor of internal revenue for first district of Pennsylvania. Confirmed and return of resolution requested March 2, 1867 (15:Index, CXIV, CCLXVII). Resolution returned March 2 (15:326). Reconsidered March 2 (15:336). [The President sent the following message March 13 (15:466):

"I nominate John W. Frazier to be assessor of internal revenue 1st district of Pennsylvania, appointed during the recess of the Senate in 1866, in place of John H. Taggart, nominated to the Senate during the last session and no action taken."]

Norman S. Andrews, marshal for Eastern district of Michigan. Rejected March 14, 1867 (15:452). Return of resolution requested

March 15 (15:462). Resolution returned March 16 (15:484; proceedings of March 19). Reconsidered and nomination confirmed March 27 (15:564–565).

John B. Bennett, register of land office at Nebraska City, Nebr. Rejected March 18, 1867 (15:469). Return of resolution requested March 19 (15:487). Resolution returned March 23 (15:502; proceedings of March 25). [Stewart McConiga nominated to same office "vice John B. Bennett, rejected," April 8 (15:664; proceedings of April 9).]

Benjamin Simpson, Indian agent in Oregon. Rejected March 19, 1867 (15:486). Return of resolution requested March 21 (15:494). Resolution returned March 23 (15:503; proceedings of March 25). Reconsidered and nomination confirmed March 25 (15:519).

83 Samuel H. Jones, marshal for Western District of Tennessee. Confirmed March 19, 1867 (15:486). Return of resolution requested March 21 (15:494). Resolution returned March23 (15:516). Reconsidered and consideration of nomination postponed March 30 (15:590). Nomination rejected April 5 (15:643).

Henry C. Witter, collector of internal revenue for twenty-third district of Pennsylvania. Rejected March 19, 1867 (See 15:1047, 1131). Return of resolution requested March 21 (15:494). Resolution returned March 23 (15:502; proceedings of March 25). [John M. Sullivan nominated to same office April 5 (15:647; proceedings of April 6).]

S. J. Wailes, naval storekeeper at Washington, D. C. Confirmed March 28, 1867 (15:571-572). Return of resolution requested March 29 (15:587). Resolution returned March 30 (15:588). Reconsidered March 30 (15:590). Nomination rejected April 3 (15:629). Motion to reconsider entered April 3 (15:630). Reconsidered and nomination again rejected, 14–19, April 5 (15:643). Motion to reconsider entered and return of resolution of April 5 requested April 8 (15:663). Resolution returned April 9 (15:672). Reconsidered and nomination confirmed April 19 (15:766). Motion to reconsider failed, 14–18, April 20 (15:782).

William A. Morton, collector of internal revenue for ninth district of Pennsylvania. Rejected March 28, 1867 (15:573). Return of resolution requested March 29 (15:587). Resolution returned March 30 (15:588). [Chauncey H. Millen nominated to same office April 6 (15:650; proceedings of April 8).]

A. C. Fisk, collector of internal revenue for third district of Louisiana. Confirmed March 28, 1867 (15:573). Return of resolution requested March 30 (15:936, 996). Resolution returned April 2 (15:599). On April 3 (15:630):

"Mr. Henderson moved that the Senate proceed to consider the motion submitted by him the 30th March last: That the Senate reconsider its resolution of the 28th March, advising and consenting to the appointment of A. C. Fisk.

"Whereupon

"Mr. Conkling raised the following question of order, viz: That the motion to reconsider is to be deemed as now made for the first time. It was not in order to make the motion nor to enter it during the last session of Congress, because the nomination had passed out of the possession of the Senate and was not returned during the session; and it cannot be made now, because it is too late in point of time,

and also because this is a new session, and the subject matter fell with the last session, and therefore not in order.

84 "The President pro tempore held that the point of order was well taken, and decided the motion of Mr. Hendricks not in order.

"From this decision Mr. Fessenden appealed to the Senate; and

"On the question, Shall the decision of the Chair stand as the judgment of the Senate?

"It was determined in the affirmative, { Yeas 18. Nays 14.

"On motion by Mr. Fessenden,

"The yeas and nays being desired by one-fifth of the Senators present,

"Those who voted in the affirmative are,

"Messrs. Buckalew, Cameron, Chandler, Cole, Conkling, Corbett, Doolittle, Henderson, Hendricks, Johnson, Morrill of Me., Nye, Patterson of Tenn., Pomeroy, Ross, Thayer, Van Winkle, and Yates.

"Those who voted in the negative are,

"Messrs. Conness, Cragin, Davis, Drake, Edmunds, Fessenden, Ferry, Howe, Morgan, Morrill of Vt., Morton, Trumbull, Willey, and Williams.

"So the decision of the Chair was sustained by the Senate."

William H. Craig, justice of the peace for Washington County, D. C. Confirmed April 3, 1867 (15:629). Return of resolution requested April 4 (15:634). Resolution returned April 6 (15:647). [No subsequent proceedings recorded in the Journal.]

Augustus W. Bradford, surveyor of customs for district of Baltimore. Confirmed, 22–16, April 4, 1867 (15:634–635). Motion to reconsider entered and return of resolution requested April 6 (15:649). Resolution returned April 10 (15:679). Reconsidered, 17–16, and nomination again confirmed, 19–17, April 16 (15:740).

Thomas Kilby Smith, consul at Panama. Confirmed April 5, 1867 (15:643). Motion to reconsider entered and return of resolution requested April 6 (15:649). Resolution returned April 8 (15:659). Reconsidered and recommitted April 11 (15:696). Reported favorably April 12 (15:697). Confirmed again April 15 (15:736).

85 RULES OF APRIL 6, 1867

On April 6, 1867 (Executive Journal 15:649) the Senate voted unanimously to insert in the 20th rule (rule 19 of 1820), after the word "decision," the words "Except a resolution confirming or rejecting a nomination by the President;" and, at the end, the words "But a motion to reconsider a vote upon a nomination shall always, if the resolution announcing the decision of the Senate has been sent to the President, be accompanied by a motion requesting the President to return the same to the Senate."

At the same time the Senate unanimously voted to strike out from the 43d rule (i. e., the resolution of March 27, 1818, cited above) the words "from day to day, as such proceedings may occur" and to insert instead the words "on the next day after such action is had, unless otherwise ordered by the Senate."

As amended, the rules are given as follows in "Rules of the Senate of the United States, and Joint Rules of the Two Houses, Washington, Government Printing Office, 1867":

"20. When a question has been once made and carried in the affirmative or negative, it shall be in order for any member of the majority to move for the reconsideration thereof; but no motion for the reconsideration of any vote shall be in order after a bill, resolution, message, report, amendment, or motion upon which the vote was taken shall have gone out of the possession of the Senate, announcing their decision, except a resolution confirming or rejecting a nomination by the President; nor shall any motion for reconsideration be in order, unless made on the same day on which the vote was taken, or within the two next days of actual session of the Senate thereafter; but a motion to reconsider a vote upon a nomination shall always, if the resolution announcing the decision of the Senate has been sent to the President, be accompanied by a motion requesting the President to return the same to the Senate."

"43. The President of the United States shall, from time to time, be furnished with an authenticated transcript of the executive records of the Senate; and all nominations approved or definitely acted on by the Senate shall be returned by the Secretary on the next day after such action is had, unless otherwise ordered by the Senate; but no further extract from the executive journal shall be furnished except by special order; and no paper, except original treaties, transmitted to the Senate by the President of the United States, or any executive officer, shall be returned or delivered from the office of the Secretary without an order of the Senate for that purpose."

PRECEDENTS FROM APRIL 6, 1867, TO MARCH 24, 1868

86 Samuel M. Pollock, brigadier general by brevet.

Senate Executive Journal.—Confirmed April 8, 1867 (15:660). Motion to reconsider entered and return of resolution requested April 10 (15:681). Resolution returned April 11 (15:693). Reconsidered and recommitted April 11 (15:695). Reported adversely April 11 (15:696). Rejected April 13 (15:709).

White House Record.[5]—No record of this case was found.

Records of the War Department.[6]—Register of brevet commissions, volume 5, 1861 to 1867, page 120:

Names of officers	Samuel M. Pollock.
Brevet rank	Brig. Genl.
U. S. Army or Volunteers	U. S. Vols.
Date of rank	Mar. 13, 1865.
For what services performed	For faithful and meritorious services.
Name of President	Andrew Johnson.
Name of Secretary	Edwin M. Stanton.
When confirmed by Senate	Apl. 8, 1867.
Date of commission	Apl. 11, 1867.
Year of independence	91.
Whence issued	A. G. O.
Whither and when sent	
When acknowledged	
Remarks	

[Under these last three columns there appears this entry in red ink: Cancelled (rejected by the Senate).]

[5] Reference is made to White House Records when such have been found. These records are fully explained in the Introduction, *supra*, at page 32.

[6] In certain cases the records of the Departments concerned have been referred to; see the Introduction *supra*, at page 32.

Joseph N. Lewis, postmaster at Shelbyville, Ill. Confirmed April 10, 1867 (15:680). Motion to reconsider entered and return of resolution requested April 12 (15:697). Resolution returned April 15 (15:734). [The President sent the following message Dec. 18 (16:112): "I nominate William A. Trower to be deputy postmaster at Shelbyville, in the county of Shelby and State of Illinois, in place of Joseph N. Lewis."]

87 Garland C. Brodhead, receiver of public moneys at Boonville, Mo. Confirmed April 13, 1867 (15:709). Motion to reconsider entered April 16 (15:740). Resolution returned "agreeably to the request of the Senate of the 16th inst.," April 18 (15:757). Resolution sent back to President April 22 (15:885, 889).

Marshall F. Moore, secretary of Territory of Colorado. Rejected April 16, 1867 (15:741). Motion to reconsider entered and return of resolution requested April 17 (15:751). Resolution returned April 18 (15:757). Nomination withdrawn April 19 (15:762).

Columbus E. Nealy, consul at Tabasco. Rejected April 16, 1867 (15:741). Motion to reconsider entered and return of resolution requested April 17 (15:751). Resolution returned April 19 (15:762). Reconsidered and nomination confirmed April 19 (15:767).

Charles Abell, collector of internal revenue for first district of Pennsylvania. Rejected April 17, 1867 (15:750). Motion to reconsider entered and return of resolution requested April 18 (15:759). Resolution returned April 19 (15:762). Reconsidered and nomination confirmed April 20 (15:782).

Moses Veale, United States attorney for Territory of Montana. Rejected April 17, 1867 (15:750). Motion to reconsider entered and return of resolution requested April 18 (15:759). Resolution returned April 19 (15:762). Reconsidered and nomination confirmed April 20 (15:781).

Charles E. DeLong, Governor of Washington Territory. Rejected April 17, 1867 (15:750). Motion to reconsider entered and return of resolution requested April 19 (15:766). Reconsidered and matter postponed until regular session April 20 (15:782). [Marshall F. Moore was confirmed for the same office April 20 (15:780).]

M. L. Blair, postmaster at Hyde Park, Pa. Confirmed April 18, 1867 (15:757). Motion to reconsider entered April 19 (15:767). Resolution returned, "in compliance with the request of the Senate of the 19th instant," April 20 (15:775). Reconsidered and nomination rejected April 20 (15:783).

88 William Johnson, collector of internal revenue for fifth district of Wisconsin. Rejected April 19, 1867 (15:766). Resolution returned, "in compliance with the resolution of the Senate of the 20th instant," April 20 (15:776). Reconsidered and nomination confirmed April 20 (15:782).

Benjamin Le Fevre, consul at Nuremberg. Rejected April 19, 1867 (15:766). Motion to reconsider entered April 19 (15:767). Resolution returned, "in compliance with the request of the Senate of the 19th instant," April 20 (15:775). Reconsidered and nomination confirmed April 20 (15:782–783).

Henry A. Wise, Chief of Bureau of Ordnance. Confirmed July 15, 1867 (15:793–794). Motion to reconsider entered and return of resolution requested July 16 (15:819). Resolution returned July 17

(15:844; proceedings of July 19). Motion to reconsider failed July 19 (15:847).

Nelson H. Davis, inspector general in Army. Confirmed July 15, 1867 (15:794). Motion to reconsider entered and return of resolution requested July 16 (15:818–819). Resolution returned July 17 (15:844; proceedings of July 19). Reconsidered and nomination rejected, July 19 (15:847) and again July 20 (15:857).

Robert Morrow, paymaster, with rank of major. Reported adversely [and apparently rejected, although the record does not so indicate] July 19, 1867 (15:847). Motion to reconsider resolution of rejection entered and return of resolution requested July 20 (15:855). Resolution returned July 20 (15:853). [Renominated Dec. 3 (16:107; proceedings of Dec. 16).]

James King, postmaster at Greensburgh, Ind. Rejected July 19, 1867 (15:847). Motion to reconsider entered and return of resolution requested July 20 (15:855). Resolution returned July 20 (15:854). Reconsidered and nomination confirmed July 20 (15:858).

Isaac L. Gibbs, Governor of Idaho Territory. Confirmed July 19, 1867 (15:847). Motion to reconsider entered and return of resolution requested July 20 (15:855). Resolution returned July 20 (15:853). Reconsidered and nomination laid on table July 20 (15:857).

Jacob Carmany, assessor of internal revenue for tenth district of Pennsylvania. Rejected Dec. 9, 1867 (16:47). Motion to reconsider entered and return of resolution requested Dec. 11 (16:95). Resolution returned Dec. 12 (16:105). Motion to reconsider failed Dec. 13 (16:106).

J. Warren Bell; collector of customs for district of Brazos de Santiago. Rejected Dec. 11, 1867 (16:95). Motion to reconsider entered and return of resolution requested Dec. 13 (16:106). Resolution returned Dec. 14 (16:108; proceedings of Dec. 16). Motion to reconsider failed Dec. 16 (16:109–110).

89 Lemuel D. Evans, collector of internal revenue for fourth district of Texas. Rejected Jan. 9, 1868 (16:126). Motion to reconsider entered and return of resolution requested Jan. 11 (16:129). Resolution returned Jan. 13 (16:133; proceedings of Jan. 16). Reconsidered and recommitted Jan. 16 (16:136), and again Feb. 5 (16:162). Reported favorably March 12 (16:197). Confirmed March 24 (16:204–205).

Noah L. Jeffries, Register of the Treasury. Nominated Dec. 2, 1867 (16:3; proceedings of Dec. 4) by the following message:

"I nominate Noah L. Jeffries to be Register of the Treasury, he having been appointed during the recess of the Senate in place of S. B. Colby, deceased.

ANDREW JOHNSON."

Confirmed, 24–18, Feb. 12, 1868 (16:166–167). Motion to reconsider entered and return of resolution requested Feb. 14 (16:168). Resolution returned with an accompanying report from the Secretary of the Treasury (see below), Feb. 19 (16:178; proceedings of Feb. 24). Letter from Mr. Jeffries referred to Committee on the Judiciary Feb. 24 (16:184). The following is from the Journal for March 12, 1868 (16:195–197):

"Mr. Edmunds, from the Committee on the Judiciary, to whom was referred, the 24th February last, the subject of the appointment of

Noah L. Jeffries to be Register of the Treasury, submitted the following report; which was ordered to be printed in confidence for the use of the *lowing Senate:

"The Committee on the Judiciary, to whom was referred a message of the President of the United States, and a letter of the Secretary of the Treasury on the subject of the appointment of Noah L. Jeffries to be Register of the Treasury, respectfully report that the nomination of Mr. Jeffries was confirmed by resolution of the Senate on Wednesday, the 12th of February last. Pursuant to the rules of the Senate the resolution of confirmation was held until Friday, the 14th of February, when, at about the hour of 11 o'clock in the morning, it was transmitted to the President. Afterwards, on the same day, the 14th of February, a motion was made, pursuant to the rules of the Senate, to reconsider the resolution of confirmation, and an order was entered directing the Secretary to request the President to return the resolution of assent, which order was transmitted and delivered to the President on the same 14th of February, at about 5 o'clock in the afternoon, and is in the fol- form.

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,
February 14, 1868.

Resolved, That the Secretary be directed to request the President of the United States to return to the Senate its resolution of the 12th instant, advising and consenting to the appointment of Noah L. Jeffries to be Register of the Treasury.

J. W. FORNEY,
Secretary.

90 "In response to this latter resolution the President, on the 19th of February, returned to the Senate the resolution of confirmation, with a message transmitting a copy of a report upon the subject from the Secretary of the Treasury, from which it appears that the resolution of the Senate recalling its resolution of confirmation so delivered to the President on the 14th, was not actually received by the Secretary of the Treasury until the 15th, Saturday, and that on the 15th, and before the Secretary of the Treasury received said resolution, Mr. Jeffries had taken the oaths required by law, and had received his commission as Register of the Treasury; and from the same communication it appears that the commission to Mr. Jeffries was actually made out at the State Department on the 14th; but whether before or after the President received the recalling resolution of the Senate does not appear; but it was not transmitted to and received by the Treasury Department until the 15th, being the day after the President had notice that the Senate had under consideration the reconsideration of the nomination, and had recalled its resolution advising and consenting to the appointment.

"The general course of business appears to be, in respect to appointments in the Treasury Department, to have the commissions signed at the Executive Mansion and entered up and recorded in the State Department and there sealed, as is required by law, and to then transmit the same to the Treasury Department for delivery to the officer upon his complying with the precedent requirements of law as to qualification, &c.

*This is evidently a misprint in the Journal, and should be inserted fifteen lines below.

"It thus appears that before Mr. Jeffries had been qualified or commissioned as required by law precedent to his entering upon the discharge of his functions under his permanent appointment the President of the United States, in whom the sole right of appointment, subject to the approval of the Senate, is vested by the Constitution, had received notice from the Senate that it had not finally acted upon the question of advising and consenting to the nomination, and withdrawing its resolution of assent to that appointment which had been transmitted to the President on the same day; and the committee are, therefore, of the opinion that the Senate may now lawfully reconsider its vote advising and consenting to the appointment if it shall see proper cause therefor. In this view of the case a majority of the committee were of opinion that it was inexpedient to enter upon an inquiry as to the matter of fact whether the issuing of the commission in this case and the qualification of the officer in question was hastened for any cause out of the usual course of business.

"The message of the President and the letter of the Secretary of the Treasury are hereto appended and returned.

91 *To the Senate of the United States:*

In compliance with the request of the Senate, of the 14th instant, I return herewith their resolution of the 12th of February, advising and consenting to the appointment of Noah L. Jeffries as Register of the Treasury, and transmit a copy of a report upon the subject from the Secretary of the Treasury.

ANDREW JOHNSON.

WASHINGTON, D. C., *February* 19, 1868.

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,
February 14,1868.

Resolved, That the Secretary be directed to request the President of the United States to return to the Senate its resolution of the 12th instant, advising and consenting to the appointment of Noah L. Jeffries to be Register of the Treasury.

Attest: J. W. FORNEY,
Secretary.

TREASURY DEPARTMENT, *February* 17, 1868.

SIR: I received, on the 15th instant, the resolution of the Senate of the preceding day, requesting you to return to that body its resolution of the 12th instant, advising and consenting to the appointment of Noah L. Jeffries to be Register of the Treasury, and have to state, in reply, that in the ordinary transaction of business the commission was issued on the 14th instant by the State Department, and was received at this Department on the 15th instant.

General Jeffries had legally qualified and entered upon the discharge of the duties of his office prior to the receipt of the Senate resolution of the 14th instant, which, under these circumstances, is herewith returned.

I am, very respectfully,

H. MCCULLOCH,
Secretary of the Treasury.

THE PRESIDENT.

[Mr. Jeffries was during the same session nominated as Commissioner of Internal Revenue July 22 (16:340; proceedings of July 23), and rejected, 16–25, July 25 (16:370). March 31, 1869 (17:49), during a subsequent session, John Allison was nominated Register "in place of N. L. Jeffries, resigned."]

White House Record.—No record of this case was found.

Moses N. Wisewell, Commissioner of Internal Revenue. Rejected Feb. 28, 1868 (16:186). Motion to reconsider entered and return of resolution requested March 6 (16:190). Resolution returned March 7 (16:192; proceedings of March 9). Motion to reconsider failed April 14 (16:227).

92 Charles Van Winkel, marshal for district of Virginia. Confirmed March 12, 1868 (16:198). Motion to reconsider entered and return of resolution requested March 16 (16:199). Resolution returned March 18 (16:202; proceedings of March 20). Motion to reconsider withdrawn March 24 (16:204).

T. W. Scott, consul at Matamoras. Rejected March 12,1868 (16:198). Motion to reconsider entered and return of resolution requested March 16 (16:199). Resolution returned March 18 (16:203; proceedings of March 20). Motion to reconsider withdrawn April 20 (16:228).

Edgar H. Bates, justice of the peace for Washington County, D. C. Confirmed March 24, 1868 (16:204–205). Motion to reconsider entered and return of resolution requested March 26 (16:209). Resolution returned March 31 (16:224; proceedings of April 7). Reconsidered and again confirmed July 25 (16:372).

93 RULES OF MARCH 25, 1868

On March 25, 1868 (Senate Journal, pp. 340–347) the Senate adopted a complete set of rules, including the following:

20. When a question has been made and carried in the affirmative or negative, whether previously reconsidered or not, it shall be in order for any senator of the majority to move for the reconsideration thereof; but no motion for the reconsideration of any vote shall be in order after the bill, resolution, message, report, amendment, or motion upon which the vote was taken shall have gone out of the possession of the Senate, announcing their decision, except a resolution confirming or rejecting a nomination by the President; nor shall any motion for reconsideration be in order, unless made on the same day on which the vote was taken, or within the two next days of actual session of the Senate thereafter; but a motion to reconsider a vote upon a nomination shall always, if the resolution announcing the decision of the Senate has been sent to the President, be accompanied by a motion requesting the President to return the same to the Senate. When any question may have been decided by the Senate, in which two-thirds of the senators present are necessary to carry the affirmative, any senator who votes on that side which prevailed in the question may be at liberty to move for a reconsideration; and a motion for reconsideration shall be decided by a majority of votes. But no motion to reconsider a vote upon a motion to reconsider shall be in order at any time.

37. "* * * Nominations neither approved nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made by the President; and if

the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned to the President, and shall not be afterwards acted upon, unless again submitted to the Senate by the President; and all motions pending to reconsider a vote upon a nomination shall fall on such adjournment or recess; and the Secretary of the Senate shall thereupon make out and furnish to the heads of departments and other officers the list of nominations rejected or not confirmed, as required by law. * * *"

43. "Nominations approved or definitely acted on by the Senate shall not be returned by the Secretary of the Senate to the President until the expiration of the time limited for making a motion to reconsider the same, or while a motion to reconsider is pending, unless otherwise ordered by the Senate. The President of the United States, shall, from time to time, be furnished with an authenticated transcript of the executive records of the Senate, but no further extract from the executive journal shall be furnished, except by special order; and no paper, except original treaties, transmitted to the Senate by the President of the United States, or any executive officer, shall be returned or delivered from the office of the Secretary of the Senate without an order of the Senate for that purpose."

PRECEDENTS FROM MARCH 25, 1868, TO JANUARY 12, 1877

94 H. G. Worthington, minister resident to Argentine Republic. Confirmed; ordered that President be notified "forthwith" June 5, 1868 (16:251–252). Motion to reconsider entered and return of resolution requested June 6 (16:252). Resolution returned June 8 (16:254; proceedings of June 9). Motion to reconsider withdrawn June 9 (16:255).

R. H. Cochran, assessor of internal revenue for sixth district of Kentucky. Rejected July 17, 1868 (16:317). Resolution returned, "in compliance with the request of the Senate of the 18th instant" (see 16:656), July 24 (16:345). Motion to reconsider failed July 25 (16:372).

William Selden, collector of internal revenue for second district of Virginia. Confirmed (16:368), motion to reconsider entered and return of resolution requested (16:369), resolution returned (16:364); and motion to reconsider failed (16:372–373), all on July 25, 1868.

William B. Storm, consul at Leeds. Confirmed (16:368), motion to reconsider entered and return of resolution requested (16:369), resolution returned (16:364), reconsidered and nomination rejected (16:373), all on July 25, 1868.

Samuel T. Crown, justice of the peace for Washington County, D. C. Confirmed (16:368), motion to reconsider entered and return of resolution requested (16:373), all on July 25, 1868. Resolution returned July 27 (16:382). Reconsidered and confirmation rejected July 27 (16:385).

Lewis A. Scott, postmaster at Lowville, N. Y.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" June 7, 1870 (17:474). Motion to reconsider entered and return of resolution requested June 9 (17:479). Resolution returned June 13 (17:480; proceedings of June 17), with the following message:

To the Senate of the United States:

In answer to the resolution of the Senate dated 9th instant, the resolution of the 7th instant advising and consenting to the appointment of Lewis A. Scott to be deputy postmaster at Lowville, Lewis County, N. Y., is herewith returned.

EXECUTIVE MANSION, *June* 13, 1870.

U. S. GRANT.

Motion to reconsider withdrawn June 17 (17:482).

95 *White House Record.*—Volume beginning March 4, 1869, arranged according to States, at page 63.

Action of Senate,
June 7, 1870.
Date of commission,
June 7, 1870.
Remarks:
6/18. Confirmation returned—motion to reconsider withdrawn. Confirmation recalled by Senate Res. of 9" June.

Bird W. Gray, district judge for Eastern District of Texas.

Senate Executive Journal.—Confirmed March 10, 1871 (18:12-13). Motion to reconsider entered and return of resolution requested March 13 (18:14-15). [The Journal does not record whether or not the resolution was returned.] Reconsidered and nomination recommitted March 20 (18:27). Reported favorably April 12 (18:62). Consideration postponed indefinitely April 19 (18:78). Renominated May 15 (18:98; proceedings of May 22). Nomination laid on table, 30-23, May 25 (18:111).

White House Record.—Volume beginning March 4, 1869, arranged according to States, at page 203.

Nominated,
May 15, 1871.
Action of Senate,
(Blank).
Date of commission,
(Blank).
Remarks:
Sent in May 22d, 1871.
[Remarks entered in pencil.]

Thomas H. (or J.) Henderson, collector of internal revenue for fifth district of Illinois.

Senate Executive Journal.—Confirmed March 17, 1871 (18:24). Motion to reconsider entered and return of resolution requested March 20 (18:27). [The Journal does not record whether or not the resolution was returned.] Motion to reconsider failed and resolution of confirmation ordered transmitted to President March 24 (18:40).

96 *White House Record.*—Volume beginning March 4, 1869, arranged according to States, at page 244.

Action of Senate,
March 17, 1871.
Date of commission,
March 29," 1871.
Remarks:
(Blank).

Edwin Eells, Indian agent for Washington Territory.

Senate Executive Journal.—Confirmed March 17, 1871 (18:24). [The Journal does not record whether or not the President was notified at this time.] Motion to reconsider entered March 20 (18:27). Motion to reconsider failed and resolution of confirmation ordered transmitted to President April 19 (18:79).

White House Record.—Volume beginning March 4, 1869, arranged according to States, at page 373.

Action of Senate,
April 17, 1871.
Date of commission,
May 1, 1871.
Remarks:
(Blank).

Nicholas H. Owings, register of Arkansas Valley district land office, Colo.

Senate Executive Journal.—Confirmed March 17, 1871 (18:24). Motion to reconsider entered and return of resolution requested March 20 (18:27). Resolution returned March 24 (18:38). Nomination withdrawn March 31 (18:49).

White House Record.—Volume beginning March 4, 1869, arranged according to States, at page 379.

Action of Senate,
March 17, 1871.
Date of commission,
(Blank).
Remarks:
3/20. Senate recalled confirmation.
3/24. Conf. retd.
3/31. Nom. withdrawn.

97 Eli F. Jennings, assessor of internal revenue for third district of Alabama.

Senate Executive Journal.—Rejected March 23, 1871 (18:37). Motion to reconsider entered and return of resolution requested March 30 (18:48). Resolution returned April 6 (18:75; proceedings of April 18). Reconsidered and nomination laid on table April 19 (18:80).

White House Record.—Volume beginning March 4, 1869, arranged according to States at page 182.

Action of Senate,
Rejected March 23d, 1871.
Date of commission,
(Blank).
Remarks:
(Blank).

Henry H. Humphreys, captain in Fifteenth Infantry.

Senate Executive Journal.—Confirmed Jan. 11, 1872 (18:167). Return of resolution requested Jan. 23 (18:178). [The journal does not record whether or not the resolution was returned.] Reconsidered and recommitted Feb. 1 (18:187). Renominated Jan. 23, 1873 (18:382; proceedings of Jan. 24), and confirmed Jan. 27 (18:385).

White House Record.—Volume beginning March 4, 1869, diplomatic, military, etc., at page 130.

Action of Senate,
January 11, 1872.
Date of commission,
Commission not signed & retd. to War Dept. cancelled Feb. 3d, 1872. [The entry under Date of commission appears in red ink.]
Remarks:
(Blank).

98 John W. Bean, first lieutenant in Fifteenth Infantry.

Senate Executive Journal.—Jan. 11, 1872 "The Senate proceeded to consider the nominations of the following-named officers for promotion in the Army of the United States, viz: * * * John W. Bean * * * and

"*Resolved*, That the Senate advise and consent to the appointment of the said persons, agreeably to their nominations, respectively" (18:167).

Jan. 23, "Mr. Cameron submitted the following resolution for consideration, viz:

"*Resolved*, That the President be requested to return to the Senate its resolution of the 11th of January advising and consenting to the appointment of * * * Second Lieut. John W. Bean to be first lieutenant in the Fifteenth Infantry.

"On motion by Mr. Cameron,

"The Senate proceeded, by unanimous consent, to consider the said resolution, and unanimously agreed thereto" (18:178). [The Journal does not record whether or not the resolution was returned.]

Feb. 1 "Mr. Cameron submitted a motion that the Senate reconsider its resolution of the 11th of January advising and consenting to the appointment of * * * Second Lieut. John W. Bean to be first lieutenant.

"On motion by Mr. Cameron,

"The Senate proceeded to consider the said motion, and unanimously agreed thereto.

"The question recurring, Will the Senate advise and consent to the appointment of the said persons?

"On motion by Mr. Cameron,

"*Ordered*, That the said nominations be recommitted to the Committee on Military Affairs" (18:187).

To the Senate of the United States:

I nominate the officer herein named for promotion in the Army of the United States:

Fifteenth Regiment of Infantry

Second Lieut. John W. Bean to be first lieutenant, December 13, 1871, vice Bradford, dismissed.

U. S. GRANT.

WASHINGTON, *June 5, 1872.*

"NOTE.—On January 11, 1872, Second Lieut. John W. Little, Fifteenth Infantry, was confirmed by the Senate to be first lieut. vice Bradford, dismissed—the restoration to the service of Capt. Henry A. Ellis, late Fifteenth Infantry (confirmed May 28, 1872),

cancels that promotion and the nomination of Lieutenant Bean is now submitted in order that the record may stand corrected and completed" (18:273).

June 10, "The Senate proceeded to consider the nominations of John W. Bean * * * and

"*Resolved*, That the Senate advise and consent to the appointment of the said persons, agreeably to their their nomihations, respectively" (18:281).

99 *White House Record.*—Volume beginning with March 4, 1869, diplomatic, military, etc., at page 25:

Action of Senate,
January 11, 1872.
Date of commission,
January 17, 1872.
Remarks:
(Blank).

James F. Legate, Governor of Washington Territory.

Senate Executive Journal.—Confirmed Jan. 26, 1872 (18:182). Motion to reconsider entered and return of resolution requested Feb. 1 (18:187). [The Journal does not record whether or not the resolution was returned.] Motion to reconsider debated Feb. 6 (18:192) and Feb. 7 (18:193). April 9 the President sent the following message to the Senate regarding Legate (18:229):

To the Senate of the United States:

I hereby withdraw, at his own request, the nomination of James F. Legate, sent to the Senate January 10, 1872, to be Governor of the Territory of Washington.

U. S. GRANT.

EXECUTIVE MANSION, *April 9, 1872.*

White House Record.—Volume beginning with March 4, 1869, arranged by States, at page 373:

Action of Senate,
January 26, 1872.
Date of commission,
January 26, 1872.
Remarks:
[In pencil:] Confirmation recalled by Senate & returned Feb. 3, 1872 [in red ink:] & nomination withdrawn Apr. 9, 1872.

[The above record of the White House indicates that a commission was issued to James F. Legate by the President on Jan. 26, 1872. See Appendix "A," infra p. 110.]

100 *Department of State Record.*—In the card record files there is a card reading—

"Legate, James F., Kans. Governor of Washington Territory, Misc. 3, p. 66, Jan. 26, 1872, conf. Appointment Cancelled."

[The words "Appointment Cancelled" are typed in red.]

In a record of the department labeled "Miscellaneous commissions permanent and temporary, Jan. 16, 1871 to March 13, 1885," Volume III, at page 66, there appears a copy of a commission made out to James F. Legate of Kansas to be Governor of Washington Territory. In this copy it is stated:

". . . Given under my hand, at the city of Washington, the twenty sixth day of January in the year of our Lord one thousand eight hundred and seventy-two and the Independence of the United States of America the ninety-sixth.

U. S. GRANT.

By the President:
HAMILTON FISH,
Secretary of State."

[On the upper left-hand corner of this copy appears in black ink the notation "Cancelled."]

James J. Kane, advancement in grade of Navy chaplain.

Senate Executive Journal.—Confirmed March 14, 1872 (18:215). Motion to reconsider entered and return of resolution requested March 18 (18:217). Resolution returned, reconsidered and recommitted March 20 (18:220). Reported favorably and again confirmed March 21 (18:221). Reconsidered and recommitted March 25 (18:222–223). Reported adversely and rejected April 12 (18:230–231).

White House Record.—Volume beginning March 4, 1869, for diplomatic, military, etc., at page 180.

Action of Senate,
March 14, 1872.
Date of commission [in red].
Confirmation recalled by Senate and Rejected under date of April 12th 1872.

101 George Nourse, register of Linkville Land Office, Oreg.

Senate Executive Journal.—Nominated May 31, 1872 (18:270; proceedings of June 1), by the following message:

To the Senate of the United States:

I nominate George Nourse, of Oregon, to be register of the land office at Linkville, Oreg., vice E. B. Watson, declined.

U. S. GRANT.

WASHINGTON, D. C., *May* 31, 1872.

(18:270; proceedings of June 1.)

Confirmed June 5, 1872 (18:274). Motion to reconsider entered and return of resolution requested June 7 (18:277). [The Journal does not record whether or not the resolution was returned.] Reconsidered and nomination placed on calendar June 10 (18:281).

During the next session, on Dec. 5, 1872, the President sent the following letter of nomination (18:312; proceedings of Dec. 6):

To the Senate of the United States:

I nominate George Nourse of Oregon who was commissioned during the recess of the Senate to be register of the land office at Linkville, Oreg.

U. S. GRANT.

WASHINGTON, D. C., *December* 5, 1872.

The Senate confirmed this nomination Dec. 11 (18:334–335).

White House Record.—Volume beginning with March 4, 1869, arranged by States, at page 350:

Action of Senate,
June 5, 1872.
Date of commission,
June 8, 1872.
Remarks [in pencil]:
Withdrawn by Senate June 10. Com. not issued.

102 Alexander Montgomery and Tredwell Moore, deputy quartermasters general with rank of lieutenant colonel.

Senate Executive Journal.—Confirmed June 6, 1872 (18:276; see p. 273). Motion to reconsider entered and return of resolution requested June 8 (18:278). Resolution returned Dec. 6 (18:330; proceedings of Dec. 9). President's message referred to Committee on Military Affairs Dec. 11 (18:334). Extract from Journal for Dec. 19 (18:352):

"Mr. West, from the Committee on Military Affairs, to whom was referred, the 11th instant, the message of the President of the 9th instant returning, in compliance with the resolution of the Senate of the 8th of June last, the resolution of the Senate of the 6th of June last advising and consenting to the appointment of Alexander Montgomery and Tredwell Moore, reported the same back with a recommendation that the Senate reconsider its resolution advising and consenting to the appointment of the said persons.

"On the question to agree to the report of the committee,

"Mr. Stevenson raised the following question of order, viz:

"That the thirty-seventh rule of the Senate provides that if the Senate shall adjourn or take a recess for more than thirty days all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned to the President and shall not be afterwards acted upon, unless again submitted to the Senate by the President; and all motions pending to reconsider a vote upon a nomination shall fall on such adjournment or recess, and that in accordance with this rule the motion to reconsider fell at the close of last session and can not, either under this message or as an original motion, be in order at this time.

"The Chair sustained the point of order, and ruled the motion of reconsideration out of order.

"Mr. Edmunds moved that the resolution by which the nominations of Alexander Montgomery and Tredwell Moore were confirmed be reconsidered.

"The Chair ruled the motion out of order for the reason that the act of appointing and confirming an officer, like that of concluding a treaty, was one in which both Executive and senatorial action are involved—the Executive having in both cases initiative. When such an act is completed, whether a confirmation or treaty, the Senate can not initiate a repeal. Action tending to a reversal must originate with the President.

"Mr. Edmunds appealed from the decision of the Chair, and,

"After debate, withdrew the appeal.

"On motion by Mr. Conkling,

"*Ordered*, That an extract from the Journal in relation to this matter be transmitted to the President of the United States."

103 *White House Record.*—Volume beginning March 4, 1869, for diplomatic, military, etc., at page 220.

Action of Senate,
June 6, 1872.
Date of commission,
July 2, 1872.
Remarks [in case of Montgomery]:
(Blank.)
Remarks [in case of Moore, entered in pencil]:
Gen. Dent has commission.

Samuel Bard, deputy postmaster at Chattanooga, Tenn.

Senate Executive Journal.—Confirmed Dec. 12, 1872 (18:335). Motion to reconsider entered and return of resolution requested Dec. 19 (18:351–352). [The Journal does not record whether or not the resolution was returned.] Resolution reconsidered Jan. 8, 1873 (18:363). Nomination withdrawn Jan. 9 (18:364; proceedings of Jan. 13) by means of the following message sent by the President to the Senate:

To the Senate of the United States:

I hereby withdraw, at his own request, the nomination of Samuel Bard to be deputy postmaster at Chattanooga, Tenn., sent to the Senate December 12, 1872.

U. S. GRANT.

EXECUTIVE MANSION, *January* 9, 1873.

White House Record.—Volume beginning with March 4, 1869, arranged by States, at page 268:

Action of Senate,
December 12, 1872.
Date of commission,
(Blank.)
Remarks:
12/19. Senate recalls confirmation.
1/7.73. Confirmation retd.
1/9. Withdrawn at his own request.

[The above record does not indicate that a commission was ever issued to Bard by the President. See Appendix "A," infra, p. 110.]

104 *Record of Post Office Department.*—Volume 28 of Register of Appointments of Postmasters in the Post Office Department (Kentucky, Tennessee, and Louisiana, 1858–1875) at p. 58 of the entries for Tennessee contains the following, under Chattanooga:

Samuel Bard (P. & S.) 12 Dec. 72.

[The Postmaster General states that it is impossible to tell from this record whether a commission was or was not made out or issued to Bard. See Appendix "B," infra, p. 111.]

E. B. Rawson, marshal for Southern District of Florida.

Senate Executive Journal.—Confirmed Dec. 12, 1872 (18:336). Motion to reconsider entered and return of resolution requested Dec. 19 (18:352). [Benjamin H. Kerr nominated Dec. 20 (18:357; proceedings of Jan. 6, 1873) "in place of E. B. Rawson, who declined the appointment."]

White House Record.—Volume beginning March 4, 1869, arranged according to States at page 177.

Action of Senate,
Dec. 12 72.
Date of commission,
(Blank.)
Remarks:
12/20. Recall of confirmation.
1/6.73. Confirmation retd.

Alva A. Knight, United States attorney for Northern District of Florida.

Senate Executive Journal.—Confirmed Jan. 21, 1873 (18:378–379). Motion to reconsider entered and return of resolution requested Jan. 27 (18:386). Resolution returned Jan. 31 (18:389; proceedings of Feb. 3), with the following message from the President to the Senate:

To the Senate of the United States:

In reply to the resolution of the Senate of the 27th instant I return herewith its resolution of the 21st instant, advising and consenting to the appointment of Alva A. Knight to be attorney of the Northern District of Florida.

U. S. GRANT.

JANUARY 31, 1873.

Motion to reconsider withdrawn and resolution ordered sent back to President Feb. 6 (18:392–393).

105 *White House Record.*—Volume beginning with March 4, 1869, arranged by States, at page 177:

Action of Senate,
Jan. 21, 1873.
Date of commission,
Jan. 21, 1873.
Remarks:
1/27. Res. of confirmation recalled.
1/31. Res. retd. to Senate
2/7. Res. of confmn. recd. back from Senate.

Records of Department of State.—Record of Attorneys, Vol. IV, at page 48 contains copy of a commission made out to Knight under date of Jan. 21, 1873.

106 Mrs. Belle C. Shumard, deputy postmaster at Fort Smith, Ark.

Senate Executive Journal.—Nominated January 29, 1873 (18:387), by the following message:

To the Senate of the United States:

I nominate Mrs. Belle C. Shumard to be deputy postmaster at Fort Smith, in the county of Sebastian and State of Arkansas, in place of Thomas C. Scott.

U. S. GRANT.

WASHINGTON, D. C., *January* 29, 1873.

Confirmed Feb. 6, 1873 (18:393). Motion to reconsider entered and return of resolution requested Feb. 25 (18:404–405). The resolution was returned to the Senate with the following message from the President (18:410):

To the Senate of the United States:

In answer to the resolution of the Senate of the 25th February, 1873, I return herewith its resolution of the 6th of February, 1873, advising and consenting, among others, to the appointment of Mrs. Belle C. Shumard to be deputy postmaster at Fort Smith, Ark.

U. S. GRANT.

EXECUTIVE MANSION, *March* 1, 1873.

After the resolution was returned, the Senate reconsidered it and recommitted the nomination March 1 (18:410).

In the proceedings of December 13, 1873 (19:184) there appears the following letter of nomination:

To the Senate of the United States:

I nominate Valentine Dell to be deputy postmaster at Fort Smith, in the county of Sebastian and State of Arkansas, in place of Thomas G. Scott, removed.

U. S. GRANT.

WASHINGTON, D. C., *December* 15, 1873.

White House Record.—Volume beginning with March 4, 1869, arranged by States, at page 325:

Action of Senate,
Feby. 6, 1873.
Date of commission,
Feby. 6, 1873.
Remarks:
Res. of con. recalled 2/25. Ref. to P. M. G. 2/26.

107 William W. Mitchell, associate justice of Supreme Court of Utah Territory.

Senate Executive Journal.—Confirmed Feb. 14, 1873 (18:398). Motion to reconsider entered and return of resolution requested Feb. 19 (18:400). [The Journal does not record whether or not the resolution was returned.] Reconsidered and nomination recommitted Feb. 25 (18:404). [Philip H. Emerson nominated to same office March 7 (19:9).]

White House Record.—Volume beginning March 4, 1869, arranged according to States at page 383.

Action of Senate,
Feby. 14, '73.
Date of commission,
(Blank.)
Remarks:
Res. of con. retd. to Senate Feb. 22, '73, in reply to request of Feb. 19.

John M. Dunn, marshal for district of Delaware.

Senate Executive Journal.—Confirmed March 10, 1873 (19:626, 634). Reconsidered and recommitted March 11 (19:36). Reported without recommendation and rejected March 21 (19:95). Motion to reconsider entered and return of resolution requested March 22 (19:102). Resolution returned March 24 (19:103). Reconsidered, and nomination recommitted and reported favorably, March 24 (19:104, 105). Confirmed, 31–14, March 26 (19:116).

White House Record.—Volume beginning March 4, 1869, arranged according to States at page 111.

Action of Senate,
Confirmed Mch. 26, '73.
Rejected Mch. 21, '73.
Date of commission,
March 26, 1873.
Remarks:
3/24. Rejection retd. to Senate in answer to Res. of Mch. 22d–73.

108 Peter C. Shannon, Chief Justice of Supreme Court of Dakota Territory.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" March 17, 1873 (19:73, 75). Motion to reconsider entered and return of resolution requested March 18 (19:79). Resolution returned March 21 (19:94) with the following message from the President to the Senate:

To the Senate of the United States:

In answer to the resolution of the Senate of the 18th instant I return herewith its resolution of the 17th instant advising and consenting, among others, to the appointment of Peter C. Shannon to be chief justice of the supreme court of Dakota Territory.

U. S. GRANT.

EXECUTIVE MANSION, *March* 21, 1873.

Reconsidered and nomination again confirmed March 21 (19:96).

White House Record.—Volume beginning with March 4, 1869, arranged by States, at page 361:

Action of Senate,
March 17, 73.
Date of commission,
21 date of new com.
March ∧ 17, 73.
Remarks:
3/20. Res. of 3/18. recalling confirmation. refd. to A. G.
3/21. Res. retd. to Senate. 3/21. Com. held up.
3/21. Reconfirmed.

L. A. Burnett, deputy postmaster at Terre Haute, Ind.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" March 18, 1873 (19:81, 82). Motion to reconsider entered and return of resolution requested March 19 (19:87). Resolution returned March 20 (19:94; proceedings of March 21). Reconsidered and nomination laid on table March 22 (19:103).

White House Record.—Volume beginning March 4, 1869, arranged according to States at page 229.

Action of Senate,
March 18, 73.
Date of commission,
(Blank.)
Remarks:
3/20. Res. of confirmation retd. under res. of 19th Mch.

109 E. Raymond Bliss, deputy postmaster at Columbus, Miss.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" March 18, 1873 (19:81–82). Motion to reconsider entered and return of resolution requested March 20 (19:90). Resolution returned March 22 (19:100), with the following message from the President to the Senate:

To the Senate of the United States:

In answer to the resolution of the Senate of the 20th instant, I herewith return its resolution of the 18th instant, advising and consenting, among others, to the appointment of E. Raymond Bliss to be deputy postmaster at Columbus, Lowndes County, Miss.

U. S. GRANT.

EXECUTIVE MANSION, *March* 22, 1873.

Motion to reconsider failed March 22 (19:102).

White House Record.—Volume beginning with March 4, 1869, arranged by States, at page 191:

Action of Senate,
March 18, 73.
Date of commission,
March 18, 73.
Remarks:
3/20. Senate recalls Res. of 18th. 3/21. P. M. G.
3/22. Confirmation retd. to the Senate.
3/24. Confirma-
received back from the Senate.

B. A. Boseman, deputy postmaster at Charleston Court House, S. C.

Senate Executive Journal.—Confirmed March 18, 1873 (19:81). Thereafter "on motion of Mr. Carpenter it was 'Ordered, That the rule be suspended, and the confirmation of this day be transmitted forthwith to the President of the United States.' (19:82). [The Senate held executive sessions on March 19 and March 20.] On March 21 the President sent a letter to the Senate withdrawing the nomination (19:94):

To the Senate of the United States:

I hereby withdraw the nomination, sent to the Senate on the 15th instant, of B. A. Boseman, to be a deputy postmaster at Charleston Court House, S. C.

U. S. GRANT.

EXECUTIVE MANSION, *March* 21, 1873.

110 On the same day the Senate unanimously;

"*Resolved*, That the nomination of B. A. Boseman of Charleston, S. C., having been confirmed and finally disposed of by the Senate and so certified to the President, can not be withdrawn, the same having gone out of the possession of the Senate" (19:96).

White House Record.—Volume beginning with March 4, 1869, arranged by States, at page 158:

Action of Senate,
March 18, 73.
Date of commission,
March 18, 73.
Remarks:
Withdrawn Mch. 21, 73.
3/21. Senate resolves that having been confirmed & certified to the Presdt. cannot be withdrawn.
3/24. Res. referred to P. M. Gen.

Ceburn L. Harris, collector of internal revenue for fourth district of North Carolina.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" March 20, 1873 (19:90, 91). Nomination withdrawn March 21 (19:94). Motion to reconsider entered and return of resolution requested March 21 (19:96). Resolution returned and reconsidered and nomination laid on table March 24 (19:104).

White House Record.—Volume beginning March 4, 1869, arranged according to States at page 148.

Action of Senate,
March 20, 73.
Date of commission,
(Blank.)
Remarks:
Withdrawn 3/21, 73. 3/21. Senate recalls confirmation.
3/24. Recall refd. to Treasy.
3/24. Res. of 20th Mch. ret'd to Senate.

William R. Sapp, collector of internal revenue for thirteenth district of Ohio.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" March 20, 1873 (19:90, 91). Motion to reconsider entered and return of resolution requested March 21 (19:96). Resolution returned and reconsidered and nomination recommitted March 24 (19:104). Nomination withdrawn March 25 (19:111). Renominated Dec. 1 (19:137; proceedings of Dec. 3), and confirmed Dec. 18 (19:195).

111 *White House Record.*—Volume beginning March 4, 1869, arranged according to States at page 214.

Action of Senate,
March 20, 73.
Date of commission,
(Blank.)
Remarks:
3/21. Senate recalls confirmation-
3/24. Treasy. 3/24. Res. of 20th inst. retd. to Senate.
3/25-Nomination of Sapp withdrawn.

John W. Clark, deputy postmaster at Montpelier, Vt.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" March 20, 1873 (19:90, 91). "Reconsidered and recalled March 21, 1873" (19:604, 751). Resolution returned March 25 (19:114; proceedings of March 26), with the following message from the President to the Senate:

To the Senate of the United States:

In answer to the resolution of the Senate of the 21st instant, I return herewith its resolution of the 20th instant, advising and consenting, among others, to the appointment of John W. Clark to be deputy postmaster at Montpelier, Vt.

U. S. GRANT.

EXECUTIVE MANSION, *March* 25, 1873.

[No subsequent proceedings recorded in the Journal.]

White House Record.—Volume beginning with March 4, 1869, arranged by States, at page 20:

Action of Senate,
March 20, 73.
Date of commission.
March 20, 73.
Remarks:
3/21. Senate recalls confirmation. 3/24. P. M. Gen.
3/25. Res. of 20th Mch. retd. 3/26. confirmation recd. back.

112 James Newby, deputy postmaster at Cambridge City, Ind.

Senate Executive Journal.—Confirmed March 24, 1873 (19:106). Motion to reconsider entered and return of resolution requested March 25 (19:112). Resolution returned March 26 (19:114). Reconsidered and nomination laid on table March 26 (19:117).

White House Record.—Volume beginning March 4, 1869, arranged according to States at page 229.

Action of Senate,
March 24, 73.
Date of commission,
(Blank.)
Remarks:
3/25. Senate recalls Res. of 24.
3/26. retd. to Senate.

Cyrus N. Baird, postmaster at Lincoln, Neb.

Senate Executive Journal.—Confirmed June 22, 1874 (19:365). Motion to reconsider entered and return of resolution requested June 23 (19:369). Resolution returned and reconsidered and nomination placed on calendar June 23 (19:370–371). Renominated Dec. 8 (19:380; proceedings of Dec. 10).

White House Record.—Volume beginning March 4, 1869, arranged according to States at page 339.

Action of Senate,
(Blank.)
Date of commission,
(Blank.)
Remarks:
(Blank.)

Robert W. Lampton, postmaster at Ashland, Ky.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Dec. 15, 1874 (19:431, 432). Motion to reconsider entered and return of resolution requested Dec. 18 (19:441). Resolution returned and reconsidered and nomination recommitted Dec. 21 (19:447, 448). [No subsequent proceedings recorded in the Journal.]

White House Record.—Volume beginning March 4, 1869, arranged according to States at page 257.

Action of Senate,
December 15, 74.
Date of commission,
(Blank.)
Remarks:
(Blank.)

[A second entry on same page gives March 11, 75 under Action of Senate and Date of Commission.]

113 J. C. S. Colby, consul at Chin Kiang.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Dec. 17, 1874 (19:439). Motion to reconsider entered and return of resolution requested Dec. 21 (19:448–449). The President replied Jan. 5, 1875 (19:460; proceedings of Jan. 7);

"In answer to the resolution of the Senate, of the 21st December last, requesting the return of its resolution of the 17th of the same

month, advising and consenting to the appointment of J. C. S. Colby to be consul of the United States at Chin Kiang, I have the honor to state that Mr. Colby's commission was signed on the 17th day of December, and upon inquiry at the Department of State it was found that it had been forwarded to him by mail before the receipt of the resolution of recall.

"U. S. GRANT."

White House Record.—Volume beginning with March 4, 1869, for diplomatic, military, etc., at page 45:

Action of Senate,
December 17, 1874.
Date of commission,
Dec. 17, 1874.
Remarks:
Res. of 12/24, 74 recalling confirmation.
See Message Bk. 1/5, 75.

William G. Ritch, secretary of Territory of New Mexico.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" June 2, 1876 (20:253–254). Motion to reconsider entered and return of resolution requested June 3 (20:254; proceedings of June 7). Resolution returned June 6 (20:254; proceedings of June 7). Nomination again confirmed, 33–7, June 28 (20:278).

White House Record.—Volume beginning March 4, 1869, arranged according to States at page 397:

Action of Senate,
June 28, 1876.
June 2, 1876.
Date of commission,
July 1, 1876.
Remarks:
6/3 Senate recalled confirmation.
6/5 Res. of confirmation retd. to Senate. Dup. Con. recd. June 28, 76.

114 John Tyler, postmaster at Jacksonville, Fla.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" June 8, 1876 (20:256). Resolution reconsidered and nomination recommitted June 20 (20:259). Nomination reported adversely and rejected June 29 (20:271–272).

White House Record.—Volume beginning March 4, 1869, arranged according to States at page 179.

Action of Senate,
(Blank.)
Date of commission,
(Blank.)
Remarks:
Rejected June 29, 1876.

John G. Clark, surveyor general of Dakota.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Jan. 12, 1877 (20:360, 361). Motion to reconsider entered and return of resolution requested Jan. 15 (20:362). Resolution returned Jan. 18 (20:365). Resolution reconsidered and nomination recommitted Jan. 22 (20:370). Nomination withdrawn Jan. 26 (20:372).

White House Record.—Volume beginning March 4, 1869, arranged according to States at page 363.

Action of Senate,
Jan. 12, 1877.
Date of commission,
(Blank.)
Remarks:
1/18. Confirmation retd. to Senate as pr request of Jany 15, 77.
Nom. withdrawn Jan. 26th, 1877.

115 RULES OF JANUARY 17, 1877

The Senate again adopted a new set of rules January 17, 1877 (Senate Journal, pp. 117–128), including the following:

20. When a question has once been decided by a vote of the Senate, whether that vote be determined by a majority or by two thirds of the Senate, any Senator voting on that side which prevailed may enter a motion or move for a reconsideration thereof, at any time on the same day on which the vote was taken, or on either of the next two days of actual session thereafter; and all motions to reconsider shall be decided by a majority of the Senate.

When a bill, resolution, report, amendment, order, or message, upon which a vote has been taken, shall have gone out of the possession of the Senate and been communicated to the House of Representatives, the motion to reconsider such vote shall be accompanied by a motion to request the House to return the same to the Senate; which last motion shall be acted upon immediately, and determined without debate, and, when determined in the negative, shall be held to be a final disposition of the motion to reconsider.

21. If the Senate shall refuse to reconsider a vote, or if, upon the reconsideration of a vote, it shall reaffirm its first decision of the question, no further motion to reconsider shall be in order, unless by unanimous consent. And every motion to reconsider a vote taken upon any amendment or other question connected with a subject under consideration shall be decided at once, and a motion to reconsider may be laid on the table without affecting the question in reference to which the same may be made, and, if carried, shall be held to be a final disposition of such motion.

72. When nominations shall be made by the President of the United States to the Senate, they shall, unless otherwise ordered by the Senate, be referred to appropriate committees, and the final question on every nomination shall be, 'Will the Senate advise and consent to this nomination?' which question shall not be put on the same day on which the nomination is received, nor on the day on which it may be reported by a committee, unless by the unanimous consent of the Senate.

73. All information communicated or remarks made by a Senator when acting upon nominations, concerning the character or qualifications of the person nominated, also all votes upon any nomination, shall be kept secret. If, however, charges shall be made against a person nominated, the committee may, in its discretion, notify such nominee thereof, but the name of the person making such charges shall not be disclosed. The fact that a nomination has been made, or that it has been confirmed or rejected, shall not be regarded as a secret.

116 74. When a nomination is confirmed or rejected, any Senator voting in the majority may move for a reconsideration on the same day on which the vote was taken, or on either of the next two days of actual executive session of the Senate; but if a notification of the confirmation or rejection of a nomination shall have been sent to the President before the expiration of the time within which a motion to reconsider may be made, the motion to reconsider shall be accompanied by a motion to request the President to return such notification to the Senate. Any motion to reconsider the vote on a nomination may be laid on the table without prejudice to the nomination, and shall be a final disposition of such motion.

75. Nominations confirmed or rejected by the Senate shall not be returned by the Secretary to the President until the expiration of the time limited for making a motion to reconsider the same, or while a motion to reconsider is pending, unless otherwise ordered by the Senate.

76. When the Senate shall adjourn or take a recess for more than thirty days, all motions to reconsider a vote upon a nomination which has been confirmed or rejected by the Senate, which shall be pending at the time of taking such adjournment or recess, shall fall; and the Secretary shall return all such nominations to the President as confirmed or rejected by the Senate, as the case may be.

77. Nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President; and if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President.

78. The President of the United States shall, from time to time, be furnished with an authenticated transcript of the executive records of the Senate, but no further extract from the Executive Journal shall be furnished, except by special order of the Senate; and no paper, except original treaties transmitted to the Senate by the President of the United States, and finally acted upon by the Senate, shall be delivered from the office of the Secretary without an order of the Senate for that purpose.

PRECEDENTS FROM JANUARY 17, 1877, TO JANUARY 11, 1884

117 Charles H. Phelps, marshal for Wyoming.

Senate Executive Journal.—Confirmed Feb. 9, 1877 (20:387). Motion to reconsider entered and return of resolution requested Feb. 16 (20:392). [The Journal does not record whether or not the resolution was returned.] Resolution reconsidered and nomination recommitted Feb. 27 (20:404). [No subsequent proceedings recorded in the Journal; Gustave Schnitger was nominated to the same position April 15, 1878 (21:293).]

White House Record.—Volume beginning March 4, 1869, arranged according to States at page 378.

Action of Senate,
Feby. 9, 1877.
Date of commission [in pencil].
Give Com. to Mr. Sniffen.
Remarks:
(Blank.)

David Porter, surveyor of customs at Savannah, Ga.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" March 16, 1877 (21:28, 29). Motion to reconsider entered and return of resolution requested March 17 (21:30). Resolution returned March 17 (21:31). Renominated (at next session) Oct. 16 (21:50; proceedings of Oct. 17) and again Dec. 14 (21:178). Confirmed March 25, 1878 (21:274).

White House Record.—Volume beginning March 4, 1877, arranged according to States at page 93.

Action of Senate,
Mch. 16, 1877.
Date of commission,
(Blank.)
Remarks:
Confirmation recalled 3/17. See Mess. Bk.

Herman H. Newell, postmaster at South Evanston, Ill.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" March 4, 1878 (21:254). Motion to reconsider entered and return of resolution requested March 5 (21:256). Resolution returned March 7 (21:260; proceedings of March 12). Motion to reconsider withdrawn April 8 (21:287).

118 *White House Record.*—Volume beginning March 4, 1877, arranged according to States at page 139.

Action of Senate,
Mch. 4, 78.
ate of commission,
May 4, 78.
Remarks:
Res. of Con. recalled by Sen. See Mess Bk, p. 67. See note, p. 270. [At page 270 there is a note reading as follows:
New Res. of confirmation—dated March 4, 78—recd. Apl. 10—& forwd. to P. M. G.]

Lewis E. Parsons, United States attorney for Northern and Middle Districts of Alabama.

Senate Executive Journal.—Rejected, 17–22, March 25, 1878 (21:273). Motion to reconsider entered and return of resolution requested March 28 (21:279). Resolution returned April 1 (21:281). Motion to reconsider withdrawn April 2 (21:285).

White House Record.—Volume beginning March 4, 1877, arranged according to States at page 102.

Action of Senate and columns following:
Rejected Mch. 25, 1878. See Res. requesting ret. of rejection. See also p. 270. [Note at page 270 is as follows: No vote taken on motion to reconsider. Parsons therefore stands rejected as of date of original rejection, which was retd. to the President Apl. 5 & forwd. to the Atty. Genl.]

119 Robert M. Reynolds, first auditor of the Treasury.

Senate Executive Journal.—Rejected, 23–26, and motion to reconsider entered March 28, 1878 (21:279). Resolution returned "in compliance with a resolution of the Senate of the 28th ultimo" April 1 (21:281). Motion to reconsider withdrawn April 1 (21:282). New motion to reconsider entered April 2 (21:283). Resolution reconsidered and nomination confirmed April 16 (21:296–297).

White House Record.—Volume beginning March 4, 1877, diplomatic, military, etc., at page 145.
Action of Senate,
April 16, 78.
Date of commission,
Apl. 16, 78.
Remarks:
Rejected Mch. 28, 1878. See Res. requesting return of Res. of Rejection.

George F. Cutter, Chief of Bureau of Provisions and Clothing and Paymaster General of Navy.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" April 16, 1878 (21:296, 297). Confirmation reconsidered and return of notification requested April 17 (21:298). Resolution returned April 17 (21:299; proceedings of April 18). Nomination recommitted April 18 (21:299). Committee authorized to sit during sessions of Senate, and to print testimony, April 22 (21:301). Nomination reported favorably May 8 (21:311). Confirmed again May 15 (21:319).

White House Record.—Volume beginning March 4, 1877, diplomatic, military, etc., at page 20.
Action of Senate,
Apl. 16, 78.
May 15, 78.
Date of commission,
May 15, 78.
Remarks:
Res. of con. recalled by Sen. 4/17.

120 Morris Marks, collector of internal revenue for district of Louisiana.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" June 6, 1878 (21:342). Motion to reconsider entered and return of resolution requested June 11 (21:348). The President replied June 14 (21:353): "In reply I would respectfully inform the Senate that upon the receipt of the notice of confirmation the commission of Mr. Marks was signed and delivered to him, on the 8th instant." [The Journal (21:353) records the fact that this message was read, but contains no subsequent reference to the case.]

White House Record.—Volume beginning with March 4, 1877, arranged according to States, at page 110:
Action of Senate,
June 6, 1878.
Date of commission,
June 8, 1878.
Remarks:
(Blank.)

William K. Peabody, consul at Rio Grande, Brazil.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" June 14, 1878 (21:354, 355). Confirmation reconsidered and return of resolution requested June 15 (12:359–360). Resolution returned June 17 (21:364). Nomination recommitted June 18 (21:366–367). [John L. Frisbie was nominated to the same position Dec. 3 (21:378).]

White House Record.—Volume beginning March 4, 1877, diplomatic, military, etc., at page 133:

Action of Senate,
June 14, 1878.
Date of commission,
(Blank.)
Remarks [in pencil]:
Recalled June 15, 78.

C. W. Fisher, Postmaster at Bucyrus, Ohio.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" June 14, 1878 (21:354–355). Confirmation reconsidered and return of resolution requested June 15 (21:360). Resolution returned June 17 (21:364). Renominated Jan. 9, 1879 (21:448). Confirmed Jan. 14 (21:454).

White House Record.—Volume beginning March 4, 1877, arranged according to States at page 121:

Action of Senate,
June 14, 78.
Date of commission,
(Blank.)
Remarks:
Recalled by Sen. June 15, 78.

121 Benjamin C. Ludlow, collector of internal revenue for third district of Texas.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" June 14, 1878 (21:354–355). Motion to reconsider entered and return of resolution requested June 15 (21:360). Resolution returned June 17 (21:364). Motion to reconsider rejected June 19 (21:370).

White House Record.—Volume beginning March 4, 1877, arranged according to States at page 114:

Action of Senate,
June 14, 78.
Date of commission,
June 22, 78.
Remarks:
(Blank.)

John Howe (or How), Indian agent at Western Shoshone Agency, Nev.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" June 14, 1878 (21:354–355). Motion to reconsider entered and return of resolution requested June 15 (21:360–361). Resolution returned and reconsidered June 17 (21:364). Confirmed again June 19 (21:369).

White House Record.—Volume beginning March 4, 1877, arranged according to States at page 218:

Action of Senate,
June 14, 78.
Date of commission,
June 21, 78.
Remarks:
Dup. con. dated June 19 [entered in pencil; the last figure has been erased and rewritten; it is now clearly 9, but may have been originally either 4 or 9].

Reuben E. Fenton, commissioner at international monetary conference.

Senate Executive Journal.—Rejected; ordered that President be notified "forthwith" June 19, 1878 (21:370). Motion to reconsider made, return of resolution requested, resolution returned and reconsidered, nomination again rejected, 23–25, renominated, confirmed, 26–22, motion to reconsider laid on table 22–21, all June 19 (21:371–374).

White House Record.—Volume beginning March 4, 1877, diplomatic, military, etc., at page 43:

Action of Senate,
June 19, 1878.
Date of commission,
June 19, 1878.
Remarks:
(Blank.)

122 Green C. Chandler, United States attorney for northern district of Mississippi.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Dec. 12, 1878 (21:416). Motion to reconsider entered and return of resolution requested Dec. 16 (21:423). Resolution returned Dec. 19 (21:439), with the following message from the President to the Senate:

To the Senate of the United States:

In compliance with a resolution of the Senate of the 16th instant, I return herewith its resolution of the 12th December, 1878, advising and consenting to the appointment of Green C. Chandler to be attorney for the United States for the northern district of Mississippi.

R. B. HAYES.

EXECUTIVE MANSION, *December* 19, 1878.

Motion to reconsider withdrawn Jan. 29, 1879 (21:495).

White House Record.—Volume beginning with March 4, 1877, arranged by States, at page 106. There are two entries for Green C. Chandler. Under the first entry there appears the following:

Action of Senate,
Dec. 12, 1878.
Date of commission.
(Blank.)
Remarks:
Res. of con. retd. to Sen. 12/19 see Mess Bk. 121.

Under the second entry the following appears:

Action of Senate,
Dec. 12, 78.
Date of commission,
Dec. 12, 78.
Remarks:
Dup. res. of con. dated 12/12, 78 recd. 1/30, 79.

123 William H. Tubbs, postmaster at New London, Conn.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Dec. 20, 1878 (21:442). Motion to reconsider entered and return of resolution requested Jan. 7, 1879 (21:445). Resolution returned Jan. 9 (21:449), with the following message from the President to the Senate:

To the Senate of the United States:

In compliance with a resolution of the Senate of 7th instant, I return herewith its resolution of December 20, 1878, advising and consenting to the appointment of William H. Tubbs to be postmaster at New London, New London County, Conn.

R. B. HAYES.

EXECUTIVE MANSION, *January* 9, 1879.

Reconsidered and nomination recommitted Jan. 10 (21:451).

Reported favorably and again confirmed Jan. 14 (21:454–455).

White House Record.—Volume beginning with March 4, 1877, arranged by States, at page 28. There are two entries on the page for Tubbs. Under the first entry there appears:

Action of Senate,
Dec. 20, 1878 (the 20 appears to have been originally 17).
Date of commission,
Dec. 20, 1878 (entered in pencil and appears to have been erased but it is still barely legible).
Remarks:
1/7, 79 Sen. recalled res. of confirmation

Under the second entry there appears the following:

Action of Senate,
Jan. 14, 1879.
Date of commission:
(Blank.)
Remarks:
(Blank.)

124 Horace Austin, register of land office at Fargo, Dak.

Senate Executive Journal—Confirmed; ordered that President be notified "forthwith" April 1, 1879 (22:26). Motion to reconsider entered and return of resolution requested April 2 (22:28). Resolution returned April 7 (22:31). Reconsidered and nomination recommitted April 7 (22:32). Reported favorably and again confirmed April 22 (22:45–46).

White House Record.—Volume beginning March 4, 1877, arranged according to States at page 228. There are two entries. Under the first entry there appears:

Action of Senate,
Apl. 1, 79.
Date of commission:
(Blank.)
Remarks:
Res. of con. recalled. See Mess. Bk. p. 115.

Under the second entry there appears:

Action of Senate,
Apl. 22, 79.
Date of commission,
Apl. 24, 79.
Remarks:
(Blank.)

Norman Buck, associate justice of Supreme Court of Idaho.

Senate Executive Journal.—Rejected, 23–26, June 30, 1879 (22:91). Motion to reconsider entered and return of resolution requested July

1 (22:96). Resolution returned July 1 (22:97). Reconsidered and nomination laid on table July 1 (22:98). Renominated Dec. 1 (22:105). Confirmed, 34–13, Jan. 27, 1880 (22:210).

White House Record.—Volume beginning March 4, 1877, arranged according to States at page 266. There are two entries. Under the first there appears:

Action of Senate:
(Blank.)
Date of commission:
(Blank.)
Remarks:
[The remarks are not in point.]

125 Under the second entry there appears:

Action of Senate, Jan. 27, 1880.
Date of commission, Jan. 27, 80.
Remarks:
(Blank.)

Joseph H. Durkee, marshal for northern district of Florida.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" June 30, 1879 (22:95). Motion to reconsider entered and return of resolution requested July 1 (22:96). Resolution returned with the following message (22:97) from the President to the Senate:

To the Senate of the United States:

In compliance with the request of the Senate of this date, I herewith return to the Senate their resolution of June 30, 1879, declining to advise and consent to the appointment of Norman Buck to be associate justice of the supreme court of the United States for the Territory of Idaho, together with the resolution of the same date advising and consenting to the appointment of Joseph H. Durkee to be marshal of the United States for the northern district of Florida.

R. B. HAYES.

WASHINGTON, D. C., *July* 1, 1879.

After the resolution was returned, the motion to reconsider was laid on the table July 1 (22:97–98).

White House Record.—Volume beginning with March 4, 1877, arranged by States, at page 98:

Action of Senate,
June 30, 79.
Date of commission,
June 30, 79.
Remarks:
(Blank.)

126 Harry A. Conant, consul at Naples.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" March 29, 1880 (22:291). Motion to reconsider entered and return of resolution requested March 30 (22:292). Motion to reconsider withdrawn and President requested "to return

to the Senate its resolution of the 30th March requesting the return of the confirmation of Henry A. Conant" April 2 (22:301).

White House Record.—Volume beginning March 4, 1877, diplomatic, military, etc., at page 23.

Action of Senate,
Mch. 29, 1880.
Date of commission,
Mch. 29, 1880.
Remarks:
[The remarks are not in point.]

Mary J. Rockafellow, postmaster at Mechanicsburg, Pa.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Jan. 5, 1881 (22:436, 437). Return of resolution requested and motion to reconsider entered Jan. 6 (22:439). Resolution returned and reconsidered and nomination recommitted Jan. 7 (22:442–443). Reported favorably Feb. 9 (22:481). Nomination withdrawn Feb. 21 (22:491; proceedings of Feb. 25).

White House Record.—Volume beginning March 4, 1877, arranged according to States at page 56.

Action of Senate,
Jan. 5, 81.
Date of Commission:
(Blank.)
Remarks:
Res. of Con. returned to Senate 1/7, 81.
Nom. withdrawn 2/21, 81.

John P. Clum, postmaster at Tombstone, Ariz.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Jan. 16, 1882 (23:237). Resolution reconsidered and nomination recommitted Jan. 17 (23:239). Nomination withdrawn May 17 (23:415).

White House Record.—Volume beginning March 4, 1881, arranged according to States at page 200. There are two entries. Under the first entry there appears:

Action of Senate,
May 5, '81.
Date of commission:
(Blank.)
127 Remarks:
(Blank.)

Under the second entry there appears:

Office to which appointed
P. M. vice Brooks, confd. but not commsd.
Nominated,
Jan. 11, '82.

Under the columns Action of Senate and Date of Commission there appears [in red ink]:

Withdrawn, May 17, '82.

There also appears on page 200 of the same record an entry for F. E. Brooks:

Office to which appointed,
P. M. vice Clum rem. for cause.
Action of Senate,
Dec. 15, 81.
Date of commission,
May 23, '82.
Remarks:
(Blank.)

Albert S. Orr, postmaster at Wilkes-Barre, Pa.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Jan. 30, 1882 (23:260). Resolution reconsidered and nomination recommitted Jan. 31 (23:263). Reported favorably and again confirmed March 22 (23:337).

White House Record.—Volume beginning March 4, 1881, arranged according to States at page 40.

Action of Senate,
Mch. 22, '82.
Date of commission,
Mch. 31, '82.
Remarks:
(Blank.)

128 John Gallagher, jr., consul general at Rio de Janeiro.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Feb. 13, 1882 (23:284). Return of resolution requested and motion to reconsider entered Feb. 16 (23:289). Resolution returned Feb. 17 (23:292). Motion to reconsider withdrawn but renewed by another Senator Feb. 21 (23:297–298). Nomination withdrawn March 3 (23:311).

White House Record.—Volume beginning March 4, 1881, diplomatic, military, etc., at page 52:

Action of Senate,
Feby. 13, '82.
Date of commission [in red],
Withdrawn March 3, '82.
Remarks:
Res. of con. retd. by request of Sen. Feb. 17, '82.

Samuel C. Mills, justice of the peace for District of Columbia.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" June 20, 1882 (23:447, 448). Return of resolution requested and motion to reconsider entered June 21 (23:451). Resolution returned June 22 (23:454; proceedings of June 26). Motion to reconsider withdrawn June 26 (23:456).

White House Record.—Volume beginning March 4, 1881, arranged according to States at page 52:

Action of Senate,
June 20, '82.
Date of commission [in red],
Res. of confmn. recalled by Sen. 6/21.

Gustavus A. De Russy, colonel in Army.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" July 6, 1882 (23:477–478). Return of resolution requested and motion to reconsider entered July 7 (23:481). Reso-

lution returned July 8 (23:484; proceedings of July 12). Motion to reconsider laid on table July 12 (23:486).

White House Record.—Volume beginning March 4, 1881, diplomatic, military, etc., at page 31:

Action of Senate,
July 6, '82.
Date of commission,
July 15, '82.
Remarks:
Res. of con. recalled July 7, '82 [in red].
Orig. res. of con. retd. by Sen. forwd. to Dep. 7/13.

129 James H. Lloyd, postmaster at Liberty, Mo.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Jan. 6, 1883 (23:584). Motion to reconsider entered and return of resolution requested Jan. 9 (23:585). Resolution returned (23:589; proceedings of Jan. 12) with the following message from the President to the Senate:

To the Senate of the United States:

In compliance with a resolution of the Senate of the 9th instant, I return herewith its resolution of the 6th instant advising and consenting to the appointment of James H. Lloyd to be postmaster at Liberty, Clay County, Mo.

CHESTER A. ARTHUR.

EXECUTIVE MANSION, *Washington, January 11, 1883.*

Reconsidered and nomination recommitted Jan. 12 (23:589). [April 16, 1884 (24:247) the President sent this message: "I nominate William H. Robinson to be postmaster at Liberty, in the county of Clay and State of Missouri, in the place of James H. Lloyd, appointed and commissioned, but not confirmed by the Senate." This message probably refers to a recess appointment given to Lloyd on March 16, 1883. Records of Post Office Department, Vol. 52, Missouri, 1877–1895, page 70, "Reappointed (P) 16 Mar. 1883."]

White House Record.—Volume beginning with March 4, 1881, arranged by States at page 146:

Action of Senate,
Jan. 6, '83.
Date of commission:
(Blank.)
Remarks [in red ink]:
Res. of con. returned upon request of Sen. 1/11, '83.

[The above record of the White House does not indicate that a commission was issued to James H. Lloyd following his confirmation by the Senate on Jan. 6, 1883.] [See Appendix "A," infra, p. 110.]

Records of Post Office Department.—Volume 52, records of appointments of postmasters (Missouri, 1877–1895) at page 70 contains the following entries under Liberty:

P&S

James H. Loyd, 23 Dec. 74 re-appt. P&S 20 Dec. '78.
Confirmation withdrawn.
Reappointed (P&S) 6 Jan. 1883. Reappointed (P) 16 Mar., 83.

[The Postmaster General states that this record does not indicate whether a commission was or was not issued to James H. Lloyd following the confirmation by the Senate on January 6, 1883. See Appendix "B," infra, p. 111.]

130 J. R. Smith, postmaster at Wheaton, Ill.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Jan. 23, 1883 (23:609). Motion to reconsider entered and return of resolution requested Jan. 29 (23:616). Resolution returned Jan. 30 (23:620; proceedings of Feb. 3), with the following message from the President to the Senate:

To the Senate of the United States:

In compliance with the resolution of the Senate of the 29th instant, I return herewith its resolution of the 23d instant advising and consenting to the appointment of J. R. Smith to be postmaster at Wheaton, Du Page County, Ill.

CHESTER A. ARTHUR.

EXECUTIVE MANSION, *January* 30, 1883.

Reconsidered and nomination recommitted Feb. 3 (23:624).

[No further record in the Executive Journal.]

White House Record.—Volume beginning with March 4, 1881, arranged by States, at page 108:

Action of Senate,
Jan. 23, '83.
Date of commission:
(Blank.)
Remarks:
Res. of con. recalled by Senate 1/29, '83.

[The above record of the White House does not indicate that a commission was issued to Smith following his confirmation by the Senate on Jan. 23, 1883. See Appendix "A," infra, p. 110.]

Records of Post Office Department.—Volume 53, records of appointments of postmasters (Illinois, Oregon), 1878–1893, at page 60, contains the following entry under Wheaton:

J. R. Smith (P & S) 23 Jan., '83.

[The Postmaster General states that this record does not indicate whether a commission was or was not issued to J. R. Smith. See Appendix "B," infra, p. 111.]

131 Elisha J. Baily and Edward P. Vollum, surgeons in Army.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Feb. 12, 1883 (23:644–645). Motion to reconsider entered and return of resolution requested Feb. 15 (23:652). Resolution returned Feb. 19 (23:655; proceedings of Feb. 21). Reconsidered Feb. 21 (23:657). Recommitted Feb. 22 (23:667). Reported favorably and again confirmed Feb. 27 (23:684–685).

White House Record.—Volume beginning March 4, 1881, diplomatic, military, etc., at pages 13 and 171.

Action of Senate,
27
Feby. ∧ 12, '83.
Date of commission,
Mch. 3, '83.
Remarks:
Res. of con. retd. 2/19 Recd. back 2/27.

Peter J. A. Cleary, assistant surgeon in Army.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Feb. 12, 1883 (23:644–645). Motion to reconsider entered and return of resolution requested Feb. 15 (23:652).

Resolution returned Feb. 19 (23:655; proceedings of Feb. 21). Reconsidered Feb. 21 (23:657). Recommitted Feb. 22 (23:667). [The index indicates that Cleary was reported favorably and confirmed Feb. 27, but the journal itself does not so indicate; see 23:684, 685, 799.]

White House Record.—Volume beginning March 4, 1881, diplomatic, military, etc., at page 22.

Action of Senate,
27
Feby. 12, '83. [It appears that the entry originally was Feby. 27, '83; the figure 27 was scratched out and 12 inserted.]
Date of commission,
Mch. 3, '83.
Remarks:
Res. of con. retd. 2/19 recd. back 2/27.

132 Laban J. Miles, Indian agent at Osage Agency, Ind. T.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Feb. 15, 1883 (23:651–652). Motion to reconsider entered and return of resolution requested Feb. 22 (23:667). Resolution returned Feb. 26 (23:673) with the following message from the President to the Senate:

To the Senate of the United States:

In compliance with a resolution of the Senate of the 22d instant, I return herewith its resolution of the 15th instant advising and consenting to the appointment of Laban J. Miles, of Iowa, to be agent for the Indians of the Osage Agency in the Indian Territory.

CHESTER A. ARTHUR.

EXECUTIVE MANSION, *February* 26, 1883.

Motion to reconsider withdrawn Feb. 27 (23:693).

White House Record.—Volume beginning with March 4, 1881, arranged by States, at page 206:

Action of Senate,
27, '83
Feby. ∧ 15, '83.
Date of commission,
Feby. 20, 83.
Remarks:
Res. of con. retd. to Sen. Feby. 26, '83.
Re-confirmed Feby. 27, 83.

Records of Department of Interior.—In a vault of the Indian Office in the Department of the Interior there is a record marked "Executive appointments confirmed from 187[9] to [1891]". At page 117 of this record there is a copy of a commission made out to Miles as agent for the Indians of the Osage Agency in the Indian Territory. This copy reads in part as follows:

* * * * * * * * * during the term of FOUR YEARS from the 27th day of February, 1883, unless this commission be sooner revoked by the President of the United States for the time being * * *.

* * * * * * * *

GIVEN UNDER MY HAND at the city of Washington, the twentieth day of February in the year of our Lord one thousand

eight hundred and eighty-three and of the independence of the United States of America the one hundred & seventh.

CHESTER A. ARTHUR.

By the President:
H. M. TELLER,
Secretary of the Interior.

133 A record labelled "Roster of inspectors, agents, &c, Indian Office No. 2" also found in the vault mentioned above shows (page 15) that Miles served up to April 20, 1883, under a previous commission which began February 27, 1879, and ran to February 26, 1883.

George W. Pritchard, United States attorney for Territory of New Mexico.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Feb. 19, 1883 (23: 653, 654). Motion to reconsider entered and return of resolution requested Feb. 21 (23: 657). Resolution returned Feb. 24 (23: 671), with the following message from the President to the Senate:

To the Senate of the United States:

In compliance with a resolution of the Senate of the 21st instant, I return herewith its resolution of the 19th instant advising and consenting to the appointment of George W. Pritchard, of New Mexico, to be attorney of the United States for the Territory of New Mexico.

CHESTER A. ARTHUR.

EXECUTIVE MANSION, *February* 24, 1883.

Motion to reconsider failed March 3 (23: 721).

White House Record.—Volume beginning with March 4, 1881, arranged by States, at page 203:

Action of Senate,
Feby. 19, 83.
Date of commission,
Feby. 19, '83.
Remarks:
Confirmation retd. to Senate Feby. 24, '83.
Orig. res. of con. returned Mch. 3, 83.

Wilbur F. Richards, Postmaster at Clarksburg, W. Va.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Feb. 21, 1883 (23: 657, 658). Resolution reconsidered Feb. 22 (23: 667). Confirmed again Feb. 27 (23: 685).

134 *White House Record.*—Volume beginning March 4, 1881, arranged according to States at page 59.

Action of Senate,
Feby. 27, '83.
Date of commission,
Mch. 27, '83.
Remarks:
(Blank.)

135 Seth P. Mobly, Postmaster at Grand Island, Neb.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Feb. 28, 1883 (23:704). Motion to reconsider entered and return of resolution requested March 1 (23:710). Resolution returned March 3 (23:723). Reconsidered and nomination rejected March 3 (23:724, 725).

White House Record.—Volume beginning March 4, 1881, arranged according to States at page 159.

Action of Senate,
Feby. 28, '83.
Date of commission [in red].
Rejected 3/3, '83.
Remarks:
Res. of con. recalled Mch. 1, '83.

RULES OF JANUARY 11, 1884

On January 11, 1884, the Senate again adopted a new set of rules, effective Jan. 21 (Senate Journal, pp. 145–159), including the following:

RULE XIII *

1. When a question has been decided by the Senate, any Senator voting with the prevailing side may, on the same day or on either of the next two days of actual session thereafter, move a reconsideration; and if the Senate shall refuse to reconsider, or upon reconsideration shall affirm its first decision, no further motion to reconsider shall be in order unless by unanimous consent. Every motion to reconsider shall be decided by a majority vote, without debate, and may be laid on the table without affecting the question in reference to which the same is made, which shall be a final disposition of the motion.

2. When a bill, resolution, report, amendment, order, or message, upon which a vote has been taken, shall have gone out of the possession of the Senate, and been communicated to the House of Representatives, the motion to reconsider shall be accompanied by a motion to request the House to return the same; which last motion shall be acted upon immediately, and without debate, and if determined in the negative, shall be a final disposition of the motion to reconsider.

136 RULE XXXVIII **

1. When nominations shall be made by the President of the United States to the Senate, they shall, unless otherwise ordered, be referred to appropriate committees; and the final question on every nomination shall be, "Will the Senate advise and consent to this nomination?" which question shall not be put on the same day on which the nomination is received, nor on the day on which it may be reported by a committee, unless by unanimous consent.

2. All information communicated or remarks made by a Senator when acting upon nominations, concerning the character or qualifications of the person nominated, also all votes upon any nomination, shall be kept secret. If, however, charges shall be made against a person nominated, the committee may, in its discretion, notify such nominee thereof, but the name of the person making such

* Rule XIII is still in effect with the sole change that words "without debate" in paragraph 1, were stricken out on June 21, 1886 (Senate Journal, p. 945).

** Rule XXXVIII, as stated above, is still in effect without further change, except that paragraph 2 was amended by the Senate, 69–2, June 18, 1929 (Senate Journal, pp. 121–122), to read as follows:

"2. Hereafter all business in the Senate shall be transacted in open session, unless the Senate in closed session, by a majority vote, shall determine that a particular nomination, treaty, or other matter shall be considered in closed executive session, in which case all subsequent proceedings with respect to said nomination, treaty, or other matter shall be kept secret: *Provided*, That the injunction of secrecy as to the whole or any part of proceedings in closed executive session may be removed on motion adopted by a majority vote of the Senate in closed executive session: *Provided further*, That Rule XXXV shall apply to open executive session: *And provided further*, That any Senator may make public his vote in closed executive session.

"Anything in the rules of the Senate inconsistent with the foregoing is hereby repealed."

charges shall not be disclosed. The fact that a nomination has been made, or that it has been confirmed or rejected, shall not be regarded as a secret.

137 3. When a nomination is confirmed or rejected, any Senator voting in the majority may move for a reconsideration on the same day on which the vote was taken, or on either of the next two days of actual executive session of the Senate; but if a notification of the confirmation or rejection of a nomination shall have been sent to the President before the expiration of the time within which a motion to reconsider may be made, the motion to reconsider shall be accompanied by a motion to request the President to return such notification to the Senate. Any motion to reconsider the vote on a nomination may be laid on the table without prejudice to the nomination, and shall be a final disposition of such motion.

4. Nominations confirmed or rejected by the Senate shall not be returned by the Secretary to the President until the expiration of the time limited for making a motion to reconsider the same, or while a motion to reconsider is pending, unless otherwise ordered by Senate.

5. When the Senate shall adjourn or take a recess for more thirty days, all motions to reconsider a vote upon a nomination which has been confirmed or rejected by the Senate, which shall be pending at the time of taking such adjournment or recess, shall fall; and the Secretary shall return all such nominations to the President as confirmed or rejected by the Senate, as the case may be.

6. Nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President; and if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President.

138 RULE XXXIX*

The President of the United States shall, from time to time, be furnished with an authenticated transcript of the executive records of the Senate, but no further extract from the Executive Journal shall be furnished by the Secretary, except by special order of the Senate; and no paper, except original treaties transmitted to the Senate by the President of the United States, and finally acted upon by the Senate, shall be delivered from the office of the Secretary without an order of the Senate for that purpose.

PRECEDENTS FROM JANUARY 11, 1884, TO JANUARY 1, 1931

139 Alfred T. Smith, major; John Bigelow, jr., William Lassiter, Charles R. Tyler, and Richard R. Steedman, first lieutenants; and William H. Johnston, jr., Charles P. George, Maury Nichols and Hampton M. Roach, second lieutenants, in Army.

Senate Executive Journal.—Confirmed Jan. 16, 1884 (24:132–133). Motion to reconsider entered and return of resolutions requested Jan. 23 (24:151). Resolutions returned Jan. 28 (24:156–157; proceedings of Jan. 29). Reconsidered and nominations recommitted

* Rule XXXIX, as stated above, is still in effect without further change.

Jan. 29 (24:157). Smith and Lassiter reported favorably Feb. 6 (24:172) and confirmed Feb. 11 (24:176). Bigelow reported favorably March 11 (24:209) and confirmed March 12 (24:212). All the others were reported favorably Feb. 15 (24:184) and confirmed Feb. 18 (24:187).

White House Record.—Volume beginning March 4, 1881, diplomatic, military, etc., in each case, as follows:

Alfred T. Smith, at page 149.
Action of Senate,
Feby. 11, '84.
Jan. 16, 84.
Date of commission,
Feby. 15, '84.
Remarks:
Res. of con. retd. to Senate 1/28, 84.
New con. Feby. 11, 84.

John Bigelow, jr., at page 13.
Action of Senate,
Mch. 12, 84.
Jan. 16, 84.
Date of commission,
Mch. 14, 84.
Remarks:
Res. of con. retd. to Senate 1/28, '84.
Res. of con. retd. by Senate 3/12, '84.

140 William Lassiter, at page 95.
Action of Senate,
Feby. 11, 84.
Jan. 16, 84.
Date of commission,
Feby. 15, 84.
Remarks:
Res. of con. retd. to Senate 1/28, 84.
New con. Feby. 11, 84.

Charles R. Tyler, at page 161.
Action of Senate,
Feby. 18, 84.
Jan. 16, 84.
Date of commission,
Feby. 25, 84.
Remarks:
Res. of con. retd. to Sen. 1/28, 84.
Recd. back under date of 2/18, 84.

Richard R. Steedman, at page 149.
Action of Senate,
Feby. 18, 84.
Jan. 16, '84.
Date of commission,
Feby. 25, 84.
Remarks:
Res. of con. retd. to Senate 1/28, 84.
Recd. back 2/18, 84.

141 William H. Johnston, at page 77. The entries are the same as those for Charles R. Tyler.

Charles P. George, at page 54. The entries are the same as those for Charles R. Tyler except:

Remarks:
Res. of con. retd. to Sen. 1/28, 84
Recd. back 2/18, 84.

Maury Nichols, at page 115. The entries are the same as those for Charles P. George.

Hampton M. Roach, at page 138. The entries are the same as those for Charles R. Tyler.

Joseph C. Ogle, postmaster at Lampasas, Tex.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Feb. 6, 1884 (24:172). Motion to reconsider entered and return of resolution requested Feb. 11 (24:176). Resolution returned and reconsidered and nomination recommitted Feb. 15 (24:183, 184). Reported favorably and again confirmed March 6 (24:204, 205).

White House Record.—Volume beginning March 4, 1881, arranged according to States at page 88.

Action of Senate,
Feby. 6, 84.
Mch. 6, 84.
Date of commission.
May 2, 84.
Remarks:
Res. of con. retd. Feby. 1[illegible] 84.
New confirmation Mch. 6, 84.

142 Thomas H. Reeves—Indian agent at Quapaw Agency, Ind. T.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" April 9, 1884 (24:242). Motion to reconsider entered and return of resolution requested April 10 (24:243). Resolution returned April 14 (24:244) with the following message from the President to the Senate:

To the Senate of the United States:

In compliance with a resolution of the Senate of the 10th instant, I return herewith its resolution of the 9th instant, advising and consenting to the appointment of Thomas H. Reeves, of Seneca, Mo., to be agent for the Indians of the Quapaw Agency in the Indian Territory.

CHESTER A. ARTHUR.

EXECUTIVE MANSION, *April* 14, 1884.

After the resolution was returned the nomination was reconsidered and recommitted April 14 (24:244, 245). Nomination withdrawn June 26 (24:300) when the President sent the following message to the Senate:

To the Senate of the United States:

I nominate William M. Ridpath, of Brazil, Ind., to be agent for the Indians of the Quapaw Agency in the Indian Territory, vice Henry M. Lawson, who has been appointed, but declines.

I withdraw the nomination of Thomas H. Reeves for this agency, which was sent to the Senate April 14, 1884.

CHESTER A. ARTHUR.

EXECUTIVE MANSION, *Washington, June* 26, 1884.

White House Record.—Volume beginning with March 4, 1881, arranged by States, at page 206:

Action of Senate,
April 9, 84.
Date of commission,
April 11, '84 (this is scratched out but is still barely legible).
Remarks:
Res. of con. retd. to Senate 4/14, 84 and nom. withdrawn June 26, '84.
[The remarks are written in a different ink from that used for the notation of Action of Senate and Date of commission.]

143 William Boult, register of land office at Natchitoches, La.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" July 4, 1884 (24:327, 330). Motion to reconsider entered and return of resolution requested July 5 (24:333). Resolution returned and reconsidered and nomination rejected July 5, 1884 (24:343).

White House Record.—Volume beginning March 4, 1881, arranged according to States at page 83.

Action of Senate [in red],
Rejected July 5, '84.
Date of commission,
(Blank.)
Remarks:
Res. of con. retd. to Sen. 7/5, '84.

David H. Hall, register of land office at Eureka, Nev.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Jan. 27, 1886 (25:296). Motion to reconsider entered and return of resolution requested Feb. 1 (25:298). Resolution returned and reconsidered and nomination recommitted Feb. 3 (25:304, 313). Nomination reported favorably July 17 (25:551), and again confirmed July 26 (25:563).

White House Record.—Volume beginning March 4, 1885, arranged according to States at page 172.

Action of Senate,
Jan. 27, '86.
July 26, '86.
Date of commission,
July 30, 1886.
Remarks:
Con. recalled. See Mess Bk. p. 47.
New confirmation July 26, '86.

William M. Campbell, Indian agent at Uintah and Ouray Agency, Utah.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Feb. 19, 1886 (25:330–331). Motion to reconsider entered and return of resolution requested Feb. 23 (25:333).

Resolution reconsidered and nomination recommitted Feb. 24 (25:336). Nomination reported favorably March 29 (25:373). Confirmed again May 5 (25:453).

144 *White House Record.*—Volume beginning March 4, 1885, arranged according to States at page 197.
Office to which appointed,
Agent for the Indians of the Uintah & Ouray Agency (consolidated) in Utah, to fill an original vacancy.
Nominated,
July 31, '86.
Action of Senate,
Aug. 3, '86.
Date of commission,
Aug. 6, '86.
Remarks [in red]:
Com. cancelled Nov. 12, '86. Campbell having failed to qualify. See Byrnes p. 229 Recess Book.

Charles H. Potter, Indian agent at Omaha and Winnebago Agency, Neb.

Senate Executive Journal.—Confirmed March 18, 1886 (25:362). Return of resolution requested March 29 (25:374). Resolution returned and reconsidered and nomination recommitted April 1 (25:384, 385). Reported adversely July 26 (25:559). Rejected Aug. 2 (25:586).

White House Record.—Volume beginning March 4, 1885, arranged according to States at page 158.
Action of Senate,
Mch. 18, '86.
Date of commission,
Rejected Aug. 2, '86.
Remarks:
Res. of Con. retd. to Sen. Apl. 1, '86 in compliance with its request.

H. M. Jewett, Consul at Sivas.

Senate Executive Journal.—Rejected March 29, 1886 (25:374). Return of resolution requested April 1 (25:385). Resolution returned and motion to reconsider entered April 5 (25:390,391). Reconsidered and nomination confirmed May 18 (25:468–469).

144½ *White House Record.*—Volume beginning March 4, 1885, diplomatic, military, etc., at page 76.
Action of Senate,
May 18, '86.
[In red under columns labeled Action of Senate and Date of commission] Rejected Mch. 29, '86.
Date of commission,
May 18, '86.
Remarks [in red]:
Res. of rejection retd. in compliance with Res. of the Sen. Apl. 5, '86 & Jewett was confirmed May 18, 1886.

Fred Puhler, postmaster at Ada, Minn.

Senate Executive Journal.—Confirmed Jan. 10, 1887 (25:690). Motion to reconsider entered and return of resolution requested Jan. 19 (25:704). Resolution returned with the following message (25:706) from the President to the Senate:

To the Senate of the United States:

In compliance with a resolution of the Senate of the 19th instant, I return herewith its resolution of the 10th instant advising and consenting to the appointment of Fred Puhler to be postmaster at Ada, Minn.

GROVER CLEVELAND.

EXECUTIVE MANSION, *January* 20, 1887.

After the return of the resolution, the nomination was reconsidered and recommitted Jan. 20 (25:707). Renominated Dec. 14 (26:39). Confirmed Jan. 10, 1888 (26:134).

White House Record.—Volume beginning with March 4, 1885, arranged by States, at page 135:

Action of Senate,
Jan. 10, '87.
Date of commission,
(Blank.)
Remarks:
(Blank.)

[The above record of the White House does not indicate that a commission was ever issued by the President to Puhler following the confirmation of the Senate on January 10, 1887. See Appendix "A," infra, p. 110.]

145 *Records of Post Office Department.*—Volume 57, records of appointments of postmasters (Minnesota-Nebraska, 1881–1892) at page 133, contains the following entry under Ada:

Confirmation withdrawn Jan. 19, 1887
(P&S) 10 Jan. 87. (P&S) 10 Jan. 88.
Fred Puhler (P) 25 Oct. 86. Fred Puhler (P) 7 Mar. 87.

[The words "Confirmation withdrawn Jan. 19, 1887" are in red ink.]

[The Postmaster General states that this record does not indicate whether a commission was or was not issued to Frederick Puhler, following confirmation by the Senate on Jan. 10, 1887. Appendix "B," infra, p. 111.]

Henry Fox, postmaster at Healdsburg, Cal.

Senate Executive Journal.—Confirmed Jan. 29, 1887 (25:719–720). Motion to reconsider entered and return of resolution requested Feb. 12 (25:736). Resolution returned Feb. 16 (25:746; proceedings of Feb. 21). [No subsequent proceedings recorded in the journal; but Dec. 11, 1890, Joseph B. Prince was nominated to the same position "in the place of Henry Fox, resigned" (27:795).]

White House Record.—Volume beginning March 4, 1885, arranged according to States at page 165.

Action of Senate,
Jan. 29, '87.
Date of commission,
Mch. 15, '87.
Remarks:
Res. of con. retd. Feby. 16 in comp. with request of the Senate. Recd. back Mch. 7, 87.

Edwin Eells, Indian agent at Nisqually and Skokomish Agency, Wash.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" July 20, 1888 (26:313–314). Motion to reconsider entered and return of resolution requested July 21 (26:314). Resolution returned July 23 (26:315; proceedings of July 30). Reconsidered July 30 (26:318). Confirmed again Sept. 18 (26:349).

White House Record.—Volume beginning March 4, 1885, arranged according to States at page 192.

Action of Senate,
July 20, '88; Sept. 18, '88.
Date of commission,
Sept. 22, 1888.
Remarks:
Res. of con. retd. to Senate in comp. with request, 7/23, '88. [All this in red, rest in black] in Wash. Tery. See copy of nom. on Message Book, p. 282. Eells was confd. 2d time Sept. 18, '88.

146 Alfred Hedberg, captain in the Army.

Senate Executive Journal.—Confirmed Feb. 26, 1889 (26:464). Motion to reconsider entered, return of resolution requested, resolution returned and reconsidered, and nomination again confirmed, all Feb. 28 (26:467–468, 470).

White House Record.—Volume beginning March 4, 1885, diplomatic, military, etc., at page 66.

Action of Senate,
Feby. 28, '89 [the 8 in 28 was apparently a 6 which was changed to an 8]
Date of commission,
Mch. 1, '89.
Remarks [first sentence in red]:
Res. of con. retd. 2/28 in comp. with req. Retd. Feby 28/89. "In accordance with an act of Cong. approved Apl. 16, 1888, I nominate the person herein named for appmt. in the Army of the U. S."

Edwin I. Kursheedt, marshal for eastern district of Louisiana.

Senate Executive Journal.—Nominated March 18, 1889 (27:15), the following message:

To the Senate of the United States:

I nominate Edwin I. Kursheedt, of Louisiana, to be marshal of the United States for the eastern district of Louisiana, vice R. B. Pleasants, deceased.

BENJ. HARRISON.

EXECUTIVE MANSION,
Washington, March 18, 1889.

Confirmed; ordered that President be notified "forthwith" March 27, 1889 (27:45, 46). Motion to reconsider entered and return of resolution requested March 29 (27:51). [The Journal does not record whether or not the resolution was returned.] Motion to reconsider and nomination referred to Judiciary Committee April 1 (27:59). Resolution reconsidered and nomination placed on calendar April 2 (27:61). The record of the proceedings of December 9 (27:71) contains the following letter:

To the Senate of the United States:

I nominate John B. Donnally, of Louisiana, to be marshal of the United States for the eastern district of Louisiana, vice Reuben B. Pleasants, deceased.

Appointed (April 17, 1889) during the recess of the Senate.

BENJ. HARRISON.

EXECUTIVE MANSION, *December 5, 1889.*

147 *White House Record.*—Volume beginning with March 4, 1889, arranged by States, at page 85:

Action of Senate,
March 27, '89.
Date of commission,
~~March 27, '89.~~
Remarks:
Confmn. recalled by the Sen. 3/29.

[The line drawn through the entry under date of commission is made in pencil. The remarks are likewise entered in pencil.]

Henry G. Rising, Postmaster at Marshall, Mo.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Jan. 16, 1890 (27:374, 376). Motion to reconsider entered and return of resolution requested Jan. 20 (27:379). [No subsequent proceedings recorded in the Journal; but Jan. 30, 1894, Azariah Peecher was nominated "in the place of Henry G. Rising, whose commission expired January 16, 1894" (29:369).]

White House Record.—Volume beginning March 4, 1889, arranged according to States at page 150.

Action of Senate,
Jan. 16, 90.
Date of commission,
Feby. 21, '90.
Remarks:
Res. recalled by Sen. 1/20, '90 & retd. 1/22. Con. recd. back from Sen. 2/6, '90.

George W. (or N.) Bradley, postmaster at Guilford, Conn.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" March 7, 1890 (27:519). Motion to reconsider entered and return of resolution requested March 10 (27:520). Resolution returned March 11 (27:522; proceedings of March 12). Reconsidered and nomination recommitted and reported favorably March 12 (27:522–523). Confirmed again March 13 (27:529).

White House Record.—Volume beginning March 4, 1889, arranged according to States at page 21.

Action of Senate,
13
Mch. ∧ ~~7~~, '90.
Date of commission,
Mch. 24, '90.
Remarks:
Confmn recalled by Sen. Mch. 10 '90, retd Mch 11 '90
Recd. back corrected to Geo. N. 3/13, '90.

148 Vinson T. Williams, postmaster at Stanberry, Mo.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" March 7, 1890 (27:519). Motion to reconsider entered and return of resolution requested March 10 (27:520). Resolution returned March 11 (27:522; proceedings of March 12). Motion to reconsider withdrawn April 16 (27:581).

White House Record.—Volume beginning March 4, 1889, arranged according to States at page 151.

Action of Senate,
Mch. 7, '90.
Date of commission,
Apl. 30, '90.
Remarks:
Confmn. recalled by Sen. Mch. 10, '90 Retd. Mch. 11, '90
Recd. back Apl. 17, '90.

John A. Flattery, postmaster at Oklahoma City, Okla.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" March 19, 1894 (29:512, 513). Motion to reconsider entered and return of resolution requested March 20 (29:514). [The Journal does not record whether or not the resolution was returned.] Resolution reconsidered and nomination recommitted March 21 (29:517). Reported favorably March 22 (29:522). Confirmed again March 28 (29:524).

White House Record.—Volume beginning March 4, 1893, arranged according to States at page 165.

Action of Senate,
28
Mch. ~~19~~, '94.
Date of commission,
Apl. 10, '94.
Remarks [in pencil]:
Res. of confm retd. to Sen. 3/21, '94 &c.

Charles D. Clark, district judge for Eastern and Middle Districts of Tennessee.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Dec. 18, 1894 (29:844). Motion to reconsider entered and return of resolution requested Dec. 20 (29:845). [The Journal does not record whether or not the resolution was returned.] Resolution reconsidered and nomination recommitted Jan. 4, 1895 (29:867). Reported favorably and again confirmed Jan. 21 (29:892).

White House Record.—Volume beginning March 4, 1893, arranged according to States at page 187.

Action of Senate,
Dec. 18, '94;
2nd confirmation January 21, '95.
Date of commission,
Jan. 21, '95.
149 Remarks:
Confirmation retd. to Senate Jan. 3, '95, in compliance with Res. of Dec. ~~18~~ 20, '94.

James J. Davidson, postmaster at Swedesboro, N. J.; John W. Goddard, postmaster at Bayonne, N. J.; Michael A. Devine, postmaster at Atlantic City, N. J.; Charles H. Pierson, postmaster at Bridgeton, N. J.; Charles W. Scott, postmaster at Cramer Hill, N. J.; R. Howard Thorn, postmaster at Ocean City, N. J.; Herman

J. Kohlhaas, postmaster at Paterson, N. J.; and William Gill, postmaster at Rockaway, N. J.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Feb. 16, 1897 (30:407–408). Return of resolutions requested and motion to reconsider entered Feb. 17 (30:412). Resolutions returned Feb. 17 (30:414–415; proceedings of Feb. 18). Motion to reconsider, in case of Kohlhaas, laid on table, 38–23, and in other cases withdrawn, Feb. 23 (30:428–429).

White House Record.—Volume beginning March 4, 1893, arranged according to States at page 130. In none of these cases is there an entry either under "Date of commission" or under "Remarks," though it appears from the Executive Journal that the motion to reconsider was withdrawn. Commissions for these nominees were never issued. President McKinley came into office on March 4, 1897.

Dallas B. Smith, postmaster at Opelika, Ala.

Senate Executive Journal.—Rejected, 18–31; ordered that President be notified "forthwith" May 16, 1898 (31:784). Return of resolution requested and motion to reconsider entered May 18 (31:799). Resolution returned May 19 (31:805). Motion to reconsider taken up but not disposed of June 27 (31:952). Renominated Dec. 14 (31:1074).

White House Record.—Volume beginning March 4, 1897, arranged according to States at page 2.

Action of Senate [in red],
Rejected May 16, 1898.
Date of commission,
(Blank.)
Remarks:
Res. of May 18, '98, Req. return of Res. of 5/16, refusing &c. appmt. of Smith. See Mess. Bk. Orig. rejection recd. from Senate July 9, '98 P. O. Dept. 7/11.

150 Charles W. Lewis, postmaster at Fernandina, Fla.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" May 24, 1898 (31:824). Return of resolution requested and resolution ordered reconsidered and recommitted when returned, May 25 (31:831–832). Resolution returned May 26 (31:833; proceedings of May 27). Reported favorably July 6 (31:984). Confirmed again July 7 (31:991).

White House Record.—Volume beginning March 4, 1897, arranged according to States at page 32.

Action of Senate,
July 7, '98 (New Confmn.)
May 24.
Date of commission,
July 29, '98.
Remarks:
Res. of confmtn. returned to Sen. May 26, '98 (in comp. with res. of 25th May).

Samuel H. Vick, Postmaster at Wilson, N. C.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" May 24, 1898 (31:824). Return of resolution requested and motion to reconsider entered May 27 (31:838). Resolution returned May 31 (31:846). [No subsequent proceedings recorded in the Journal.]

White House Record.—Volume beginning March 4, 1897, arranged according to States at page 148.

Action of Senate,
[in pencil] May 24, '98.
[in ink] May 24, '98.
Date of commission,
[in pencil] June 30, '98.
Remarks [in pencil]:
Res. of confmn retd. 5/31, '98 in comp. with res. of 5/27, '98.

Daniel G. Engle, postmaster at Marietta, Pa.; Henry F. Hershey, postmaster at Steelton, Pa.; Henry D. Ruth, postmaster at Lansdale, Pa.; and William D. Williams, jr., postmaster at McDonald, Pa.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" March 31, 1900 (32:447). Return of resolutions requested and resolutions reconsidered April 2 (32:447). Resolutions returned April 3 (32:448; proceedings of April 4). Nominations recommitted April 4 (32:448). Engle, Hershey, and Ruth reported favorably April 14 (32:460) and again confirmed April 16 (32:461). [Williams was renominated Dec. 14, 1900 (32:606) and confirmed March 2, 1901 (32:725, 726).]

151 *White House Record.*—Volume beginning March 4, 1897, arranged according to States at page 179.

Action of Senate,
Mch. 31, 1900 (in all four cases).
There is an additional entry under this for all of the nominees except William D. Williams, jr., as follows:
New confm ["confmn" in case of Engle] Apl. 16, 1900.
Date of commission,
For Daniel G. Engle and Henry D. Ruth the entry is:
Apl. 28, 1900.
For Henry F. Hershey the entry is:
May 1, 1900.
For William D. Williams, jr., there is no entry.
Remarks:
The following remarks are applicable to all four of the nominees:
Res. of confirmations returned to Senate Apl. 3, 1900 in compliance with res. of April 2, 1900.

A. M. Smith, postmaster at Brunswick, Ga.[1]

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" June 28, 1902 (31:594 or 622*). Motion to reconsider entered and return of resolution requested June 30 (31:596 or 624*). Resolution returned and reconsidered, and nomination recommitted July 1 (31:603 or 631*). [No subsequent proceedings recorded in the Journal.]

White House Record.—Volume beginning March 4, 1901, arranged according to States at page 36.

Action of Senate,
(Blank.)
Date of commission,
(Blank.)
Remarks:
6/30/1902. Resolution of confirmation of the 28th instant returned in compliance with resolution of June 30, 1902.

[1] From this point on, volume and page references are to the original journals.
* Double paging in this volume.

152 William Plimley, assistant treasurer at New York.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" March 10, 1903 (33:10). Motion to reconsider entered and return of resolution requested March 12 (33:17). Resolution returned March 13 (33:19). Nomination withdrawn March 13 (33:46). Resolution of confirmation considered March 18 (33:50).

White House Record.—Volume beginning with March 4, 1901, arranged by States, at page 142:

Action of Senate,
Mch. 10, 1903.
Date of commission,
Mch. 12, 1903.
Remarks: Mch.

Records of Treasury Department.—

1. A memorandum as follows:

Letter from Mr. Loeb, secretary to the President, about March 9th, stating that the President desired nomination prepared and sent over for William Plimley of New York, to be assistant treasurer at New York.

Nomination prepared and sent to the President March 10th.

Notice of nomination and confirmation in Congressional Record of March 10th.

Official notice of confirmation from the Secretary of the Senate, through the White House, dated March 10th, received at the appointment division March 11th.

Commission prepared March 12th and sent to the White House; was signed by the President, attested by the Secretary of the Treasury, received the seal of the Treasury Department, and a letter notifying Mr. Plimley of his appointment and enclosing official bond for execution by him was prepared and mailed, addressed, "William Plimley, 151 West 8th Street, New York City"; all of which occurred on the same date.

Shortly after four o'clock on March 12th, the chief of the division of appointments was called up on the telephone by the White House and asked what papers were on file in the Plimley case, to which the chief replied, all papers which accompanied the President's direction that nomination be prepared and no others. The White House then asked what was the status of the case; answer: Commission signed by the President had received the seal of the Treasury Department;
that a bond had been prepared, and letter notifying Mr.
153 Plimley of his appointment had been placed in the mail.
White House asked to hold up everything until Mr. Latta of the White House staff could come over. Mr. Latta immediately came to the division of appointments bringing with him the resolution of the Senate recalling its notice of confirmation, and with the direction of the President to get commission and all papers in the case and take them with him to the White House.

The chief of appointment division conferred with the Secretary and, with his knowledge and consent, gave to Mr. Latta all papers on file here, but did not deliver the commission, the same being inaccessible at that time.

The chief of appointment division, on his own responsibility, but with the knowledge of the Secretary, intercepted bond and letter

mailed to Mr. Plimley in the Washington City Post Office and had it returned to the department.

The next day, at the request of the President, Mr. Plimley's commission, together with a brief containing citations from the decisions of the Supreme Court of the United States and the Attorney General, was taken to the White House by the Secretary, where they still remain.[8]

On March 18th directions were received from the White House by telephone to prepare a request for the withdrawal of the nomination of Mr. Plimley from the Senate. Request was promptly prepared and taken to the White House by the chief of division of appointments, who delivered the same to Mr. Loeb, the President's Secretary. Later in the day directions were received by wire from the White House to prepare a nomination of Hamilton Fish of New York as assistant treasurer at New York in place of Jordan, deceased. Nomination prepared and sent to the White House by messenger.

2. An envelope addressed to "Mr. William Plimley, 151 West 80th St., N. Y. City," postmarked "March 12 5.30 p. m., 1903" and having on it a notation in red ink reading "Return to writer on request by phone. 3.12.03.#74." In this envelope there is an official bond in the amount of $400,000 and, also, a slip of paper with a notation "Senate notice of confirmation to Plimley sent to Pres. March 13, 03 at his request." The letter of March 12 addressed to William Plimley in this envelope is as follows:

154 Notice of appointment under confirmation and transmitting bond.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., March 12, 1903.

Mr. WILLIAM PLIMLEY,
151 West 80th Street, New York City.

SIR: By direction of the Secretary, I have to inform you that the President of the United States has, by and with the advice and consent of the Senate, appointed you to the office of assistant treasurer of the United States at New York, N. Y., by a commission dated March 12, 1903.

You will therefore enter into bond with the United States in the penal sum of four hundred thousand dollars ($400,000) in accordance with the enclosed form and the rules regulating the execution thereof, and transmit the same to this office for examination, approval and file.

Your commission will be forwarded when your official bond shall have been received and approved.

Respectfully,

(Signed) CHAS. LYMAN,
Chief, Division of Appointments.

(Incl.)

Theodore P. Shonts, Charles E. Magoon, Benjamin M. Harrod, Oswald H. Ernst, Peter C. Hains, and Mordecai T. Endicott, members of Isthmian Canal Commission.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Dec. 16, 1905 (38:107). Resolution reconsidered and return of resolution requested Dec. 20 (38:125). Resolution re-

[8] With the cooperation of the office of the Attorney General, counsel for the petitioner attempted to trace the brief referred to in this memorandum, but they were unsuccessful.

turned and nominations recommitted Dec. 21 (38:129). [Each of these was given a recess appointment immediately after the adjournment of Congress.]

White House Record.—Volume beginning with March 4, 1905, for diplomatic, military, etc.

Theodore P. Shonts, at page 126.
Confirmed,
Dec. 16, 1905.
Commissioned,
Confirmation res. withdrawn Dec. 21, 1905.
Remarks:
(Blank.)

155 Charles E. Magoon, at page 93.
Confirmed,
Dec. 16, 1905.
Commissioned,
Confirmation withdrawn Dec. 21, 1905.
Remarks:
(Blank.)

Benjamin M. Harrod, at page 60.
The entries are the same as those for Charles E. Magoon.

Oswald H. Ernst, at page 41.
Confirmed,
Dec. 16, 1905.
Commissioned,
Confirmations withdrawn Dec. 21, 1907.
Remarks:
(Blank.)

Peter C. Hains, at page 60.
The entries are the same as those for Charles E. Magoon.

Mordecai T. Endicott, at page 41.
Confirmed,
Dec. 16, 1905.
Commissioned,
Confirmations withdrawn Dec. 21, 07.
Remarks:
Dec. 11, 1905 new nom. as Civ. Engr. U. S. N.

John F. Wetherill, postmaster at Spencerville, O.

Senate Executive Journal.—Rejected; ordered that President be notified "forthwith" Jan. 14, 1908 (40:183). Motion to reconsider entered and return of resolution requested Jan. 16 (40:191). Resolution returned Jan. 20 (40:194). Motion to reconsider withdrawn and resolution sent back to President May 16 (40:420).

White House Record.—Volume beginning March 4, 1905, arranged according to States at page 180.
Confirmed,
Rejected Jan. 14, 1908.
Commissioned,
(Blank.)

156 Remarks:
To P. O. Jan. 15, 1908. Resolution of rejection returned to Senate Jan. 20, 1908. Rejection returned & to P. O. May 18, 1908.

Robert A. McDonald, postmaster at Grand Rapids, Wis.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Feb. 26, 1908 (40:283). Motion to reconsider entered and return of resolution requested Feb. 27 (40:287). Resolution returned March 2 (40:290). Motion to reconsider withdrawn and resolution sent back to President April 30 (40:399).

White House Record.—Volume beginning March 4, 1905, arranged according to States at page 252.

Confirmed,
Feby. 26, 1908.
Resolution of confirmation returned Senate 3/2/08.
Resolution of confirmation received again at White House Apr. 30, 1908 & to P. M. G. May 1, 08. Feby. 28, 1908. Sen Res. requesting return of res. of confirmation Rec. & sent to P. O. Dept.
Commissioned,
May 12, 1908.
Remarks:
[All entries in this column are marked with arrows to go under "confirmed" and hence are listed under that heading above.]

Charles L. Farrar, postmaster at Macon, Mo.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" April 22, 1908 (40:379). Motion to reconsider entered and return of resolution requested April 24 (40:383). Resolution returned April 29 (40:396). Motion to reconsider withdrawn and resolution sent back to President May 6 (40:406).

White House Record.—Volume beginning March 4, 1905, arranged according to States at page 129.

Confirmed,
Apr. 22, 1908.
Commissioned,
May 12, 1908.
Remarks:
Res. of Apr. 24, 1908, asking return.
Confirmation ret. Apr. 29, 08.
Returned & sent to P. O. May 7, 08.

157 Joseph Davis, postmaster at Taylor, Pa.

Senate Executive Journal.—Confirmed April 28, 1908 (40:394) Motion to reconsider entered and return of resolution requested May 1 (40:401). Resolution returned May 4 (40:402). Reconsidered and nomination recommitted May 21 (40:435). Nomination withdrawn May 22 (40:436).

White House Record.—Volume beginning March 4, 1905, arranged according to States at page 201.

Confirmed,
Apr. 28, 1908.
Commissioned,
Nomination withdrawn, May 22, 1908.
Remarks:
May 2, 08—Sen. res. of 5/1/08—asking return of res. of con.
May 4, 08—Res. ret. to Sen.

J. C. Stancil, postmaster at Smithfield, N. C.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" March 11, 1910 (43:174). Motion to reconsider entered and return of resolution requested March 14 (43:177). Resolution returned March 15 (43:179). Reconsidered and nomination recommitted March 16 (43:181). Reported favorably April 15 (43:219). Confirmed again May 17 (43:245).

White House Record.—Volume beginning with March 4, 1909, arranged according to States at page 185.

Confirmed,
May 17, 1910.
Mch. 11, 1910.
Commissioned,
July 5, 1910.
Remarks:
Mch. 14, 1910—Senate requested return of res. of confirmation.
Mch. 15, 1910—Returned.

Everett Martin Balcom, second lieutenant of Infantry.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Feb. 3, 1911 (44:119). Motion to reconsider entered and return of resolution requested Feb. 6 (44:120). Resolution returned and reconsidered and nomination recommitted Feb. 10 (44:124). Nomination withdrawn Feb. 21 (44:143).

White House Record.—Volume beginning with March 4, 1909, for diplomatic, military, etc., at page 16.

Confirmed,
Feby. 3, 1911.
158 Commissioned,
Feby. 21, 1911.
Nomination withdrawn.
Remarks:
Feby. 10, 1911—resolution of confirmation returned to Senate in compliance with res.

John O. Huey, postmaster at Mannington, W. Va.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Dec. 20, 1911 (46:52). Motion to reconsider entered Dec. 21 (46:56). Motion to reconsider withdrawn and resolution transmitted "forthwith" to President Jan. 30 (31), 1912 (46:96).

White House Record.—Volume beginning with March 4, 1909, arranged according to States at page 278.

Confirmed,
Dec. 20, 1911.
Commissioned,
Feby. 28, 1912.
Remarks:

Atlas M. Lee, postmaster at Huntingdon, Tenn., and William T. H. Thorn, postmaster at Rutherford, Tenn.

Senate Executive Journal.—Confirmed March 4, 1912 (46:135). Motion to reconsider entered and return of resolution requested March 13 (46:147). Resolution returned March 15 (46:152; proceedings of March 18), reconsidered and nominations recommitted March 18 (46:152). Nominations withdrawn Aug. 1 (46:257).

White House Record.—Volume beginning with March 4, 1909, arranged according to States at page 248.

Confirmed,
Mch. 4, 1912.
Commissioned,
Withdrawn Aug. 1, 1912.
Remarks:
Res. returned to Sen. 3/15/12 in response to res. of 3/13/12.

159 Lawrence C. Wines, postmaster at Maywood, Ill.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" July 18, 1912 (46:245-246). Motion to reconsider entered and return of resolution requested Aug. 1 (46:258). Resolution returned Aug. 3 (46:263; proceedings of Aug. 6). Nomination withdrawn Aug. 6 (46:263).

White House Record.—Volume beginning with March 4, 1909, arranged according to States at page 64.

Confirmed,
July 18, 1912.

In the space under the headings, Commissioned and Remarks, appears the following:

Confirmation res. returned to Sen. Aug. 3, 1912.
Nomination withdrawn Aug. 6, 1912.

John H. McEniry, postmaster at Bessemer, Ala.

Senate Executive Journal.—Confirmed July 27, 1912 (46:254). Motion to reconsider entered and return of resolution requested July 29 (46:255). Resolution returned and reconsidered and nomination recommitted Aug. 1 (46:257, 258). Nomination reported favorably and again confirmed Aug. 15 (46:276).

White House Record.—Volume beginning with March 4, 1909, arranged according to States at page 3.

Confirmed,
Aug. 15, 1912.
July 27, 1912.
Commissioned,
Aug. 24, 1912.
Remarks:
Aug. 1, 1912 confirmation res. returned to Sen.
Memo attached to page with paper clip contains copy of Senate resolution of July 29 with notation reading "Original sent to Post Office Dept. July 30, 1912 [this is typed and the remainder is in ink]. Again confirmed Aug. 6 15, 1912 and sent to P. M. G. Aug. 16, 1912.

160 Samuel C. Campbell, postmaster at Enid, Okla.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" June 2, 1913 (48:154–155). Return of resolution requested June 6 (48:163). Resolution returned and reconsidered June 10 (48:179). Nomination recommitted June 17 (48:195). Reported favorably July 14 (48:275). Confirmed again July 15 (48:277).

White House Record.—[4]
Nominated,
5/15/13.
Confirmed,
6/2/13.
7/15/13.
Commissioned,
7/29/13.
Remarks:
June 10, 1913 resolution of confirmation returned to Senate.

Thomas Fox, postmaster at Sacramento, Cal.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Aug. 5, 1913 (48:336). Motion to reconsider entered and return of resolution requested Aug. 6 (48:338). Resolution returned Aug. 9 (48:344; proceedings of Aug. 11). Reconsidered and nomination recommitted Aug. 11 (48:344). Reported favorably Aug. 21 (48:369). Considered Aug. 27 (48:385), Sept. 8 (48:410) and Sept. 9 (48:413), and confirmed, 37–11, Sept. 10 (48:416–418).

White House Record.—
Nominated,
5/15/13.
Confirmed,
8/5/13.
Confirmed again,
9/10/13.
Commissioned,
9/13/13.
Remarks:
Aug. 9, 1913 resolution of confirmation returned to Senate.

161 Myrtie Nelson, postmaster at Bowman, N. D.; J. W. Stambaugh, postmaster at Carrington, N. D.; W. W. Smith, postmaster at Valley City, N. D.; and Frank Renning, postmaster at Velva, N. D.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Sept. 18, 1913 (48:436). Motion to reconsider entered and return of resolutions requested Sept. 22 (48:437). Resolutions returned, message ordered to lie on the table, and names restored to the calendar Sept. 25 (48:442–443). Nominations recommitted Sept. 29 (48:448). [All four persons were renominated Dec. 20, 1913 (49:10). Stambaugh and Renning were confirmed March 11, 1914 (49:177). Nelson was confirmed March 12 (49:179) but reconsidered March 13 (49:182). Smith was not confirmed in 1914.]

[4] Beginning with the administration of President Wilson, the records of nominations and commissions are kept on cards.

White House Record.—
Myrtie Nelson:
Nominated,
12/15/13.
Confirmed.
NOT CONFIRMED.
Nominated,
12/18/14.
Confirmed,
12/29/14,
Commissioned,
1/19/15.
J. W. Stambaugh:
Confirmed,
3/11/14.
Commissioned,
4/1/14.
W. W. Smith:
Nominated,
12/18/14.
Confirmed,
12/29/14.
Commissioned,
2/3/15.
Frank Renning:
Confirmed,
3/11/14.
Commissioned,
3/26/14.

162 A. W. Howell, Postmaster at Frost, Tex.

Senate Executive Journal.—Confirmed; ordered that and President be notified "forthwith" Jan. 12, 1914 (49:40, 41, 43). Return of resolution requested Jan. 13, (49:44). Resolution returned and nomination recommitted Jan. 17 (49:54, 55). Reported favorably Jan. 27 (49:79). Confirmed again Jan. 30 (49:88).

White House Record.—
Nominated,
12/22/13.
Confirmed,
1/2/14.
Commissioned,
2/19/14.
Remarks:
Jan. 17, 1914 Res. of Conf. returned to Sen. in response to Res. 1/13/14

James Norton, Postmaster at Hackensack, N. J.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Jan. 12, 1914 (49:40, 42, 43). Return of resolution requested Jan. 13 (49:44). Resolution returned and nomination recommitted Jan. 17 (49:54, 55). Reported favorably Feb. 11 (49:113). Confirmed again Feb. 18 (49:125).

White House Record.—
Confirmed,
1/12/14.
Again confirmed,
2/18/14.
Commissioned,
3/4/14.

Harry W. Blaisdell, James L. Brown, Joseph D. Halleck, Harry H. Harvey, Harry D. Johnson, Ernest W. Lacy, Joseph A. Mahoney, Anson F. McCreary, Leon Martin, Eugene H. Tennent, and Lucien C. Williams, assistant dental surgeons in Navy; George C. Fowler and William M. Thebaut, assistant dental surgeons in Dental Reserve Corps.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Jan. 5, 1916 (51:155, 157). Resolution reconsidered and nominations recommitted Jan. 6 (51:178). Reported favorably Feb. 3 (51:266). Confirmed again; ordered that President be notified "forthwith" Feb. 7, 2:08 p. m. (51:271, 272). Confirmation reconsidered and return of resolution requested Feb. 7, 5:18 p. m. (51:272). Resolutions returned and nominations restored to the calendar Feb. 10 (51:275–276). [No subsequent proceedings recorded in the Journal.]

White House Record.—There is no record in the White House concerning these cases.

163 William M. Huntley, postmaster at Rush Springs, Okla.

Senate Executive Journal.—Confirmed Jan. 11, 1916 (51:203–204). Return of resolution requested Jan. 17 (51:230). Resolution returned Jan. 25 (51:247). Reconsidered and nomination rejected Jan. 27 (51:253).

White House Record.—
Confirmed,
1/11/16.
Commissioned,
Rejected, Jan. 27, 1916.

Frank Seymour Reed, receiver of public moneys, and Edward Malcolm Kirton, register of land office, at Glasgow, Mont.[10]

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" July 27, 1921 (60:378). [M. C. Latta, of the White House staff, signed general receipt dated 10.45 a, m., July 28.] Return of resolution requested Aug. 1 (60:393). Resolution returned and nominations recommitted Aug. 10 (60:422). Reported favorably Aug. 23 (60:489). Confirmed again Aug. 24 (60:509).

White House Record.—
Confirmed,
7/27/21.
8/24/21.
Commissioned,
8/24/21.

[10] From this point on, references are given, in brackets at the appropriate place under "Senate Executive Journal," to pertinent matter contained in the receipt books on file in the office of the Executive Clerk of the Senate.

James R. Miller, postmaster at Strasburg, Va.

Senate Executive Journal—Confirmed; ordered that President be notified "forthwith" Jan. 17, 1922 (61:183). [I. R. Smith signed general receipt dated 11.05 a. m., Jan. 18.] Return of resolution requested and motion to reconsider entered Jan. 18 (61:194). Resolution returned and reconsidered, and nomination recommitted Jan. 20 (61:198). Reported favorably March 24 (61:589–590). Confirmed again March 27 (61:610).

White House Record.—
Confirmed,
1/17/22.
3/27/22.
Commissioned,
4/8/22.

164 William Pennar, postmaster at Laporte, Minn.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Feb. 28, 1922 (61:411, 412). [I. R. Smith signed general receipt dated 11.35 a. m. March 1.] Return of resolution requested March 2 (61:432). Resolution returned March 4 (61:456; proceedings of March 7). Reconsidered and nomination recommitted March 7 (61:457). Reported favorably March 23 (61:563). Confirmed again March 24 (61:591).

White House Record.—
Confirmed,
3/24/22.
Commissioned,
4/19/22.

Ernest E. Goding, Postmaster at Dix, Neb.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" March 16, 1922 (61:513). [M. C. Latta signed general receipt dated March 17.] Resolution reconsidered and nomination recommitted March 17 (61:517). Reported favorably April 24 (61:736, 737). Confirmed again April 25 (61:745).

White House Record.—
Confirmed,
4/25/22.
Commissioned,
5/10/22.

Luther P. Maxey, postmaster at Adairville, Ky.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" May 18, 1922 (61:841). Notification received at White House May 19, 10.30 a. m. [receipt signed by M. C. Latta]. Return of resolution requested and motion to reconsider entered May 19 (61:844). Resolution returned and nomination recommitted May 20 (61:854). Reported favorably June 6 (61:918). Again confirmed June 8 (61:927).

White House Record.—
Confirmed,
5/18/22.
Again confirmed,
6/8/22.
Commissioned,
6/21/22.

165 Forrest L. Strong, postmaster at Clinton, Okla., and Elmer D. Rook, postmaster at Sayre, Okla.

Senate Executive Journal—Confirmed; ordered that President be notified "forthwith" Jan. 30, 1923 (63:232). [M. C. Latta signed general receipt dated 10.55 a. m. Jan. 31.] Motion to reconsider entered and return of resolutions requested Feb. 1 (63:237). Resolution returned Feb. 2 (63:248; proceedings of Feb. 3). Confirmed again; ordered that President be notified "forthwith" Feb. 5 (63:255). Return of resolutions requested, resolutions reconsidered, and nominations recommitted Feb. 6 (63:266). Resolution returned Feb. 8 (63:273). Strong reported favorably Feb. 13 (63:296) and again confirmed Feb. 14 (63:302). Rook reported favorably Feb. 19 (63:314), and again confirmed Feb. 23 (63:325).

White House Record—

Forrest L. Strong:
Confirmed,
1/30/23.
Again confirmed,
2/5/23 and 2/14/23.
Commissioned,
3/15/23.

Elmer D. Rook:
Confirmed,
1/30/23.
Again confirmed,
2/5/23 and 2/23/23.
Commissioned,
3/16/23.

Dovie Varney, postmaster at Edgarton, W. Va.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Jan. 23, 1924 (64:377). [J. F. Sheahan signed general receipt dated Jan. 24.] Resolution reconsidered and nomination placed on the calendar Jan. 24 (64:386). Confirmed again Jan. 28 (64:392).

White House Record—

Confirmed,
1/28/24.
Commissioned,
2/23/24.

166 Walter L. Cohen, comptroller of customs at New Orleans, La.

Senate Executive Journal.—Rejected, 35–37; ordered that President be notified "forthwith" Feb. 18, 1924 (64:475–476). Notification received at White House Feb. 19, 10.55 a. m. [receipt signed by C. T. Hess]. Motion to reconsider and request return of resolution entered Feb. 26 (64:497). Resolution returned and consideration March 17 agreed to, Feb. 28 (64:506). Reconsidered and nomination confirmed, 39–38, March 17 (64:547–549).

White House Record—

Confirmed,
3/17/24.
Commissioned,
3/21/24 sgd. 3/22/24.

Herbert A. Harvey, postmaster at Newell, Iowa.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" April 3, 1924 (64:599). [C. T. Hess signed general receipt dated April 4.] Reconsidered and return of resolution requested April 15 (64:624). Resolution returned (64:635) with the following message from the President to the Senate:

To the Senate:

In compliance with the request of the Senate of April 15, 1924, I return herewith the resolution of the Senate of April 3, 1924, advising and consenting to the appointment of Herbert A. Harvey to be postmaster at Newell, Iowa.

CALVIN COOLIDGE.

THE WHITE HOUSE, APRIL 21, 1924.

The nomination was also withdrawn by the President the same day (64:635).

White House Record—

Date of Confirmation,
4/3/24.
Commissioned,
(Blank.)

[The above White House record does not indicate that a commission was ever issued by the President to Harvey following his confirmation of April 3, 1924. See Appendix "A," infra, p. 110.]

167 *Records of Post Office Department.*—Volume 93 records of appointments of postmasters (Iowa) 1900–1908 at p. 64, contains the following entry, under Newell:

Nomination withdrawn (act) Dec. 1–23.
Herbert A. Harvey, Apr. 3–24 Loys E. Couch Apr. 26–24.

The records of the Post Office Department also contain a card, on which appears the following entry:

Herbert A. Harvey, Act. PM, Dec., 1–23. Apr. 3–24 nomination withdrawn.

[Other entries on this card contain the letter "c" in red ink above the date of confirmation. There is no such entry above the date of confirmation of Herbert A. Harvey. The Postmaster General states that the above records of the Post Office Department show that no commission was issued to Harvey. See Appendix "B," infra, p. 111.]

William H. Steinke, Postmaster at Des Plaines, Ill.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Dec. 21, 1925 (66:286). [C. T. Hess signed general receipt dated Dec. 22.] Return of resolution requested Jan. 25, 1926 (66:470). Resolution returned Jan. 28 (66:500). Resolution reconsidered and nomination rejected Jan. 28 (66:502).

White House Record.—

Under the columns, Confirmed and Commissioned, there appears:

Rejected.
1/28/26.

James A. Cobb, judge of municipal court of District of Columbia.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" March 17, 1926 (66:706). Notification received

at White House March 18 [receipt signed by J. F. Sheahan]. Return of resolution requested and motion to reconsider entered March 18 (66:713). Resolution returned March 22 (66:717). Motion to reconsider failed June 10 (66:1048).

White House Record.—
Confirmed,
3/17/26.
Commissioned,
3/17/26.
Remarks:
Com. sgd. 6/12/26.

168 Charles R. Ligon, marshal for northern district of Mississippi.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" May 5, 1926 (66:895). [C. T. Hess signed general receipt dated May 6.] Motion to reconsider entered and return of resolution requested May 7 (66:907). Resolution returned May 8 (66:914). Resolution sent back to President May 25 (66:980).

White House Record.—
Confirmed,
5/5/26.
Commissioned,
5/5/26.
Remarks:
Com. sgd., 5/28/26.

John W. Pole, Comptroller of the Currency.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Saturday, Dec. 8, 1928 (69:82). Motion for reconsideration entered early in the session of Monday, Dec. 10 (69:85). [Mr. Bailey, the executive clerk, states that the President had not in fact been notified.] Confirmation reconsidered and nomination recommitted Dec. 11 (69:97). Reported favorably Dec. 13 (69:107). Confirmed again Dec. 14 (69:131).

White House Record.—
Confirmed,
12/14/28.
Commissioned,
12/17/28.

J. Reuben Clark, jr., Under Secretary of State.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Jan. 23, 1929 (69:297, 298). Motion to reconsider entered and return of resolution requested Jan. 30 (69:320). Request of Jan. 30 vacated Feb. 1 (69:332).

White House Record.—
Confirmed,
1/23/29.
Commissioned,
1/23/29.

Florence F. Davenport, postmaster at Napoleon, N. D.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" Jan. 31, 1930 (71:276). Motion to reconsider

entered and return of resolution requested Feb. 1 (71:281). Resolution returned Feb. 3 (71:282). Motion to reconsider withdrawn March 22 (71:451).

White House Record.—

[No record concerning commission.]

169 W. Bateman Cullen, postmaster at Clayton, Del.

Senate Executive Journal.—Confirmed; ordered that President be notified "forthwith" April 28, 1930 (71:585, 591). Motion to reconsider entered and return of resolution requested April 30 (71:603). Resolution returned May 2 (71:608). Reconsidered and nomination recommitted May 7 (71:635). Renominated Feb. 20, 1931 (73:444), and confirmed Feb. 25 (73:480).

White House Record.—

[No record concerning commission.]

APPENDIX "A"

THE WHITE HOUSE,
Washington, November 7, 1931.

MY DEAR SENATOR PEPPER:

You have requested information concerning the records in the executive offices of the White House with respect to several individuals who have been nominated for certain offices by the President and confirmed by the Senate. You have specifically requested information as to whether the records of the White House disclose that a commission was or was not issued by the President in eight instances. I submit herewith the results of a careful examination of these records.

1. The case of Samuel M. Pollock, who was nominated by President Johnson to be a brigadier general by brevet, could not be located among our records.

2. James F. Legate—the records of the executive office indicate that a commission was issued by the President on January 26, 1872.

3. Samuel Bard—the records of the executive office do not indicate that a commission was ever issued by the President.

4. J. R. Smith—the records of the executive office do not indicate that a commission was ever issued by the President.

5. James H. Lloyd—the records of the executive office do not indicate that a commission was ever issued by the President.

170 6. Frederick Puhler—the records of the executive office do not indicate that a commission was ever issued by the President following the confirmation of the Senate on January 10, 1887. They do indicate, however, that Frederick Puhler was renominated December 14, 1887, reconfirmed January 10, 1888, and commissioned February 20, 1888.

7. William Plimley—the records of the executive office indicate that a commission was issued to William Plimley as Assistant Treasurer at New York on March 12, 1903.

8. Herbert A. Harvey—the records of the executive office do not indicate that a commission was ever issued by the President.

The above statements that the records of the executive office indicate no commissions were issued in certain instances are based upon

the fact that no entry is made under the column entitled "Date of commission" in the records.

I trust that this information will be satisfactory for your purpose.

Sincerely yours,

(Sgd.) LAWRENCE RICHEY,
LAWRENCE RICHEY,
Secretary to the President.

Hon. GEORGE WHARTON PEPPER,
2225 Land Title Building, Philadelphia, Pennsylvania.

APPENDIX "B"

OFFICE OF THE POSTMASTER GENERAL,
Washington, D. C., November 7, 1931.

Hon. GEORGE WHARTON PEPPER,
2225 Land Title Building, Philadelphia, Pennsylvania.

MY DEAR SENATOR PEPPER:

You have requested information concerning the records of the Post Office Department with respect to several individuals who have been nominated for the office of postmaster at various times in the past. You have specifically requested information as to whether the records of the Post Office Department show that a commission was or was not made out or issued in the following instances:

Samuel Bard, who was nominated postmaster, and confirmed by the Senate, at Chattanooga, Tennessee, on December 12, 1872;

J. R. Smith, who was nominated postmaster, and confirmed by the Senate, at Wheaton, Illinois, on January 23, 1883;

171 James H. Lloyd, who was nominated postmaster, and confirmed by the Senate, at Liberty, Missouri, on January 6, 1883;

Frederick Puhler, who was nominated postmaster, and confirmed by the Senate, at Ada, Minnesota, on January 10, 1887;

Herbert A. Harvey, who was nominated postmaster at Newell, Iowa, on March 27, 1924, and confirmed by the Senate on April 3, 1924.

A careful examination of the records of this department has been made. This examination discloses that in the first four cases named above there is no record in this department which indicates either that a commission was or was not made out or issued.

In the first four cases mentioned above, the department's records consist merely of a memorandum or blotter showing the names of persons, appointed as postmasters and the dates of confirmation by the Senate, with notations, which we fear are fragmentary and incomplete regarding certain incidental matters. This explains our inability to answer your questions in these four instances.

The only explanation that can be made at this time of the fact that the records of some offices are more complete than others is that in transferring data from the earlier records to the ones available to-day in the department, those making the transfers probably considered certain information of too little importance to be made a matter of record. The earliest records available in the department to-day and from which the above information was obtained, were begun in 1889.

In the fifth case cited, that of Herbert A. Harvey, who was nominated postmaster at Newell, Iowa, on March 27, 1924, and confirmed by the Senate on April 3, 1924, the records of this department show that no commission was issued to Mr. Harvey and he did not assume charge of the Newell post office under this appointment.

Very truly yours,

(Sgd.) WALTER F. BROWN.

172 In the Supreme Court of the District of Columbia

No. 79553, at law

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE OTIS SMITH, RESPONDENT

Order

Filed Dec. 22, 1931

The above cause having come on to be heard before this court, upon petition for a writ of quo warranto and the answer filed by the respondent herein, upon a schedule of Senate precedents filed of record herein, and upon a stipulation of both counsel, under date of December 10, 1931, entitled "Agreement of Counsel in Regard to Facts Concerning Nomination, Confirmation, and the Issuance of Commissions in Specific Cases, as Shown by the Senate Executive Journal, by Records of the Executive Offices of the White House, and in Certain Instances by Departmental Records," filed of record by order of this court under date of December 14th, 1931.

Now, on motion of George Wharton Pepper, Esq., attorney for the respondent herein, it is

Ordered and adjudged that the petition for a writ of quo warranto be and hereby is denied, with costs to be paid by petitioner, in
173 conformity with an opinion handed down by this court dated December 5, 1931.

From the foregoing judgment, the petitioner by the United States attorney of the District of Columbia, in open court, notes an appeal to the Court of Appeals.

PEYTON GORDON, *Justice.*

Dated December 22nd, 1931.

174 In the Supreme Court of the District of Columbia

No. 79553, at law

UNITED STATES OF AMERICA, PETITIONER

against

GEORGE OTIS SMITH, RESPONDENT

Assignment of errors

Filed Dec. 29, 1931

The petitioner respectfully designates the following assignments of error relied upon by it in the prosecution of its appeal from the order of this court entered on December 22, 1931.

First. That the said court erred in denying the petition for a writ of quo warranto by its order entered December 22, 1931.

Second. That the said court erred in holding that the respondent has been duly and regularly appointed to the office of member of the Federal Power Commission and duly and regularly designated as chairman thereof.

Third. That the said court erred in holding that the Senate of the United States, by action duly and regularly taken and pursuant to and in accordance with its standing rules, advised and consented to the appointment of the respondent as a member of the Federal Power Commission.

175 Fourth. That the said court erred in failing and refusing to hold that the Senate of the United States, by action duly and regularly taken and pursuant to and in accordance with its standing rules, refused to advise and consent to the appointment of the respondent as a member of the Federal Power Commission.

Fifth. That the said court erred in holding that the Senate of the United States had pursuant to and in accordance with its standing rules parted with possession and control of the nomination of the respondent and transferred such control to the President of the United States, by ordering on the 20th day of December, 1930, that the President of the United States be notified forthwith of its vote and action had and taken on said 20th day of December, 1930, on said nomination.

Sixth. That the said court erred in holding that the Senate of the United States by ordering on the 20th day of December, 1930, that the President of the United States be notified forthwith of its vote and action had and taken on said 20th day of December on the nomination of the respondent intended that the President of the United States proceed at once to appoint the respondent as a member of the Federal Power Commission, and that said order was tantamount to a warrant to proceed forthwith to issue a commission to the respondent.

Seventh. That the said court erred in holding that the Senate of the United States by ordering on the 20th day of December, 1930, that the President of the United States be notified forthwith

176 of its vote and action had and taken on said 20th day of December on the nomination of the respondent waived its election to reconsider said vote and action.

Eighth. That the said court erred in holding that the Senate of the United States had no power to vote on a motion to reconsider its vote and action had and taken on the said nomination of the respondent unless and until the President of the United States, in compliance with the request of the Senate for the return of the notification sent to him on the 22nd day of December, 1930, by its order of the 20th day of December, 1930, returned said notification to the Senate.

Ninth. That the said court erred in holding that the Senate of the United States had no power pursuant to and in accordance with its standing rules to reconsider the nomination of the respondent, unless the Senate had in its possession the copy of the resolution of the 20th day of December, 1930, notifying the President of the United States of its vote and action had and taken on said day advising and consenting to the appointment of respondent, transmitted to the President by the Secretary of the Senate on the 22nd day of December.

Tenth. That the said court erred in holding that the Senate of the United States lost its power pursuant to and in accordance with its standing rules to reconsider its vote and action had and taken on the 20th day of December, 1930, advising and consenting to the appointment of the respondent, by the refusal of the President of the
177 United States to return to the Senate the notification transmitted to the President on the 22nd day of December, 1930, by its order of the 20th day of December, 1930.

Eleventh. That the said court erred in holding that the Senate of the United States lost its power pursuant to and in accordance with its standing rules to reconsider its vote and action had and taken on the 20th day of December, 1930, advising and consenting to the appointment of the respondent, by the President's appointment of the respondent as a member of the Federal Power Commission and his designation of the respondent as chairman thereof on the 22nd day of December, 1930.

Twelfth. That the said court erred in holding that the President of the United States had no power to return to the Senate of the United States the notification transmitted to him on the 22nd day of December, 1930, by order of the Senate of the 20th day of December, 1930, after the President had appointed the respondent as a member of the Federal Power Commission and had designated him as chairman thereof.

Thirteenth. That the said court erred in other respects apparent.

Dated December 23, 1931.

JOHN W. DAVIS,
ALEXANDER J. GROESBECK,
Attorneys for Petitioner-Appellant.

Service of a copy of the above assignment of errors acknowledged this — day of December, 1931.

GEORGE WHARTON PEPPER,
Attorney for Respondent-Appellee.

Filed December 29, 1931.

178 In the Supreme Court of the District of Columbia

No. 79553 at law

UNITED STATES OF AMERICA, PETITIONER

against

GEORGE OTIS SMITH, RESPONDENT

Designation of record

Filed Dec. 29, 1931

Now comes the appellant in the above-entitled cause, by John W. Davis and Alexander J. Groesbeck, its attorneys, and designates the parts of the record which it desires to have included in the transcript, said parts being considered sufficient for the determination of the questions raised on appeal, namely:

1. Petition for writ of quo warranto filed May 4, 1931.
2. Answer of the respondent to said petition for writ of quo warranto filed May 23, 1931.

3. Opinion of Justice Peyton Gordon, together with the pamphlet, Senate Precedents, made by said opinion a part of the record of this court in the above-entitled cause, filed on December 5, 1931.

4. The stipulation entitled "Agreement of Counsel in
179 Regard to Facts Concerning Nomination, Confirmation and the Issuance of Commissions in Specific Cases, as Shown by the Senate Executive Journal, by Records of the Executive Offices of the White House, and in Certain Instances by Departmental Records," made part of the record of this court by order of December 14, 1931, in the above-entitled cause.

5. Order of Justice Peyton Gordon, entered December 22, 1931, denying said petition for a writ of quo warranto.

6. Assignment of errors filed December —, 1931.

7. This designation of record.

JOHN W. DAVIS,
ALEXANDER J. GROESBECK,
Attorneys for Petitioner-Appellant.

Dated December 23, 1931.

Service of a copy of the above designation of record acknowledged this 23 day of December, 1931.

GEORGE WHARTON PEPPER,
Attorney for Respondent-Appellee.

Filed December 29, 1931.

180 Supreme Court of the District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 179, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 79553 at law, wherein United States of America is petitioner and George Otis Smith is respondent, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 22nd day of January, 1932.

[SEAL.] FRANK E. CUNNINGHAM, *Clerk.*

[Indorsement on cover:] District of Columbia Supreme Court. No. 5596. United States of America, appellant, vs. George Otis Smith. Court of Appeals, District of Columbia. Filed Jan. 22, 1932. Henry W. Hodges, Clerk.

INDEX TO "SENATE, WHITE HOUSE AND DEPARTMENTAL PRECEDENTS"

	Page
Introduction	31
1. The Senate Executive Journal	31
2. Records in Executive Offices of the White House	32
3. Departmental Records	32
Rules of February 25, 1790	33
Rules of March 26, 1806	33
Resolution of March 27, 1818	33
Rules of January 3, 1820	33
Resolution of January 5, 1829	34
Precedents from 830 to 1843	34
Resolution of February 18, 1843	34
Precedents from 1843 to April 5, 1867	34–49
Rules of April 6, 1867	49
Precedents from April 6, 1867, to March 24, 1868	50–55
Rules of March 25, 1868	55–56
Precedents from March 25, 1868, to January 12, 1877	56–71
Rules of January 17, 1877	71–72
Precedents from January 17, 1877, to January 11, 1884	72–85
Rules of January 11, 1884	85–86
Precedents from January 11, 1884, to January 1, 1931	86–110
Appendix A—Letter from Lawrence Richey, Secretary to the President, to Honorable George Wharton Pepper	110
Appendix B—Letter from Walter F. Brown, Postmaster General, to Honorable George Wharton Pepper	111

INDEX OF NAMES

Name	
Abbott, Walter	40
Abell, Charles	51
Adams, LaRue P	40
Allen, William	47
Andrews, Norman S	48
Austin, Horace	77
Baggs, Frederick	39
Bailey, William C	38
Baily, Elisha J	82
Baird, Cyrus N	69
Balcom, Everett Martin	101
Bard, Samuel	63, 110, 111
Barker, Albert S	40
Barnes, Joseph K	39
Bartlett, J. R., jr	40
Batcheller, O. A	40
Bates, Edgar H	55
Bean, John W	59
Beaumont, M. H	44
Bell, J. Warren	52
Benedict, George A	41
Bennett, John B	43
Benton, William P	41
Bigelow, John, jr	86–87
Binney, William C	44
Birdsay, Linus B	46
Black, James W	47
Blair, M. L	51
Blaisdell, Harry W	105
Blake, Charles C. (or F.)	40
Blake, Henry J	40
Bliss, E. Raymond	66

Name	Page
Boal, George	37
Boardman, William	45
Bonifant, W	41
Boseman, B. A	67
Boult, William	89
Boyle, John W	44
Bradford, Augustus W	49
Bradley, George W. (or N.)	93
Brevet appointments of 1866	42
Brevet appointments of 1867	45
Bridgman, William R	40
Brodhead, Garland C	51
Brown, George M	40
Brown, James L	105
Bryant, John H	43
Buck, Norman	77
Bugby, Benjamin N	45
Burnett, L. A	66
Burns, Robert	35
Byers, William	45
Campbell, Samuel C	102
Campbell, Thomas P	37
Campbell, William M	89
Carmany, Jacob	52
Carpenter, James B	47
Cary, Samuel F	43
Catlin, Thomas B	36
Chamberlain, James H	47
Chandler, Green C	76
Chew, Richard S	40
Clark, Charles D	94
Clark, J. Reuben, jr	109
Clark, John G	70
Clark, John W	68
Clark, Robert	43
Cleary, Peter J. A	82
Clowes, Thomas	36
Clum, John P	79
Coates, Benjamin F	45
Cobb, James A	108
Cochran, R. H	56
Cockrill, E. L	43
Cohen, Walter L	107
Colby, J. C. S	69
Colton (or Cotton), Charles S	40
Conant, Harry A	78
Coolidge, James C	47
Cotton (or Colton), Charles S	40
Craig, William H	49
Cramer, James L	37
Crosby, Elisha O	36
Crown, Samuel T	56
Cull, James	38
Cullen, W. Bateman	110
Cutter, George F	74
Czapkay, Louis J	43
Davenport, Florence F	101
Davidson, James J	94
Davis, Joseph	100
Davis, Nelson H	52
DeLong, Charles E	51
Denlinger, Henry	39
Denman, Hampton B	46
DeRussy, Gustavus A	80
Devine, Michael A	94
Donn, Thomas C	38
Dorr, Ralph S	39

Name	Page
Doubleday, Abner	37
DuBarry, Edmund L	34
Duke, John M	43
Dunn, John M	65
Durkee, Joseph H	78
Edwards, John	41
Eells, Edwin	58, 92
Egan, Thomas W	44
Einstein, Max	36
Ellett, Alfred W	38
Emory, William H	35
Endicott, Mordecai T	98
Engle, Daniel G	96
Ernst, Oswald H	98
Evans, Daniel	36
Evans, Lemuel D	52
Farrar, Charles L	100
Fenton, Reuben E	76
Findlay, John V. L	42
Fisher, Benjamin F	41
Fisher, C. W	75
Fisk, A. C	48
Fitzhugh, William M	44
Flattery, John A	94
Fowler, George C	105
Fox, Henry	91
Fox, Thomas	103
Frazier, John W	47
French, H. T	40
Frost, Westley	46
Fry, James B	42
Gallagher, John, jr	80
George, Charles P	86–88
Gibbs, Isaac L	52
Gill, William	95
Goddard, John H	41
Goddard, John W	94
Goddard, Paul B	38
Goding, Ernest E	106
Graham, Charles K	37
Granger, Gordon	37
Gray, Bird W	57
Green, Charles	40
Greer, A. L	37
Gurnee, Ralph	35
Hains, Peter C	98
Hall, Asaph	40
Hall, David H	89
Halleck, Joseph D	105
Harkness, William	40
Harris, Ceburn L	67
Harris, Leonard A	43
Harrod, Benjamin M	98
Harvey, Harry H	105
Harvey, Herbert A	108–110–111
Haswell, Gouverneur K	40
Hazeltine, Edward C	40
Heath, H. H	44
Hedberg, Alfred	92
Henderson, Thomas H. (or J.)	57
Henry, Charles A	37
Hershey, Henry F	96
Hill, Isaac	34
Hills, Lewis S	45
Howe (or How), John	75
Howell, A. W	104
Huey, John O	101

Name	Page
Humphreys, Henry H	58
Huntley, William H	105
Irish, Orsamus H	39
Jeffries, Noah L	52–55
Jennings, Eli F	58
Jewett, H. M	90
Johnson, Granville E	40
Johnson, H. L	40
Johnson, Harry D	105
Johnson, William	51
Johnston, William H., jr	86–88
Jones, Charles D	40
Jones, Samuel H	48
Kane, James J	61
Kearney, Stephen W	35
Kellogg, E. N	40
King, James	52
Kirton, Edward Malcolm	105
Knight, Alva A	64
Kohlhaas, Herman J	95
Krzyzanowski, Waldemeier	37
Kursheedt, Edwin I	92
Lacy, Ernest W	105
Lampton, Robert W	69
Langdon, Basset	44
Lassiter, William	86–87
Lathrop, Charles C	37
Learned, Bela P	42
Lee, Atlas M	101
Le Fevre, Benjamin	51
Legate, James F	60, 110
Levy, C. M	40
Lewis, Charles W	95
Lewis, Joseph N	51
Ligon, Charles R	109
Lloyd, James H	81, 110, 111
Ludington, Elisha H	40
Ludlow, Benjamin C	75
Lyon, A. McDonald	40
McCandless, William G	43
McCormick, A. H	40
McCracken, Marcus W	40
McCreary, Anson F	105
McDonald, Robert A	100
McElroy, John H	102
McKane, Allen	39
Magoon, Charles E	98
Mahoney, Joseph A	105
Marks, Morris	74
Martin, Leon	105
Maxey, Luther P	106
Merrifield, Edwin R	35
Miles, Laban J	83
Miller, James R	106
Miller, Morrill	40
Mills, Samuel C	80
Mitchell, William W	65
Mobly, Seth P	84
Montgomery, Alexander	62
Moore, Marshall F	51
Moore, Tredwell	62
Morrow, Robert	52
Morton, William A	48
Mundee, Charles	98
Murphy, Edmund	42
Nalle, F. J	40
Nealy, Columbus E	81

Name	Page
Nelson, Myrtie	103
Newby, James	69
Newell, Herman H	73
Nichols, Maury	86–88
Nones, Jefferson H	36
Norton, Eli P	45
Norton, James	104
Nourse, George	61
Ogle, Joseph C	88
Orr, Albert S	80
Owings, Nicholas H	58
Parker, Edward T	41
Parsons, Lewis E	78
Patterson, James A	35
Peabody, William K	74
Pearson, F	40
Pennar, William	106
Phelps, Charles H	72
Pierce, Benjamin K	84
Pierson, Charles H	94
Plimley, William	97, 110
Pole, John W	109
Pollock, Samuel M	50, 110
Porter, David	72
Porter, Fitz-John	36
Potter, Charles H	90
Pritchard, George W	84
Puhler, Fred	90–91, 110, 111
Rawson, E. B	63
Read, John H. and John J	40
Reed, Frank Seymour	105
Reeves, Thomas H	88
Renning, Frank	103
Reynolds, John F	37
Reynolds, Robert M	73
Richards, Wilbur F	84
Ripley, Christopher Gore	35
Rising, Henry G	93
Ritch, William G	70
Ritter, William H	36
Roach, Hampton M	86–88
Rockafellow, Mary J	79
Rogers, George W	43
Rook, Elmer D	107
Rowland, William S	35
Rumsey, H. B	40
Ruth, Henry D	96
Sanders, M. W	40
Sapp, William R	68
Schenck, Caspar	40
Scott, Charles W	94
Scott, Lewis A	56
Scott, T. W	55
Seely, Henry B	40
Selden, William	50
Seney, George E	41
Shannon, Peter C	66
Shonts, Theodore P	98
Shumard, Mrs. Belle C	64
Sibley, Henry H	38
Simons, James	35
Simpson, Benjamin	48
Sloanaker, Albert B	42
Smith, A. M	96
Smith, Alfred T	86–87
Smith, Dallas B	94
Smith, J. R	82, 110, 111

Name	Page
Smith, Thomas Kilby	49
Smith, W. W	103
Spalding, Hillary C	38
Stambaugh, J. W	103
Stancil, J. C	101
Starr, Henry A	45
Steedman, Richard R	86–87
Steinke, William H	103
Storm, William B	56
Strong, Forrest L	107
Sykes, Francis W	41
Sykes, George	37
Tanner, John T	42
Tennent, Eugene H	105
Terry, Silas W	40
Thebaut, William M	105
Thorn, R. Howard	94
Thorn, William T. H	101
Tracy, C. W	40
Tubbs, William H	76
Tucker, John	36
Turley, John A	45
Turner, Henry S	35
Tyler, Charles R	86–87
Tyler, John	70
Tyndale, Hector	38
Updike, Scott W	36
Van Winkel, Charles	55
Varney, Dovie	107
Veale, Moses	51
Vick, Samuel H	95
Vollum, Edward P	82
Wailes, S. J	48
Wallace, James	40
Ward, Durbin	45
Warner, William H	35
Warren, S. L	47
Wemple, D. D	40
Wetherill, John F	99
Wheaton, Frank	37
Whitman, Quincy D	46
Williams, Lucien C	105
Williams, Thomas I	38
Williams, Vinson T	94
Williams, William D., jr	96
Wilson, Joseph S	43
Wines, Lawrence C	102
Wise, Henry A	51
Wiswell, Moses N	55
Witter, Henry C	48
Wood, G. W	40
Worthington, H. G	56
Wright, Horatio G	39
Wright, Isaac H	34
Wylie, Andrew	38
Zeiber, Albert	47
Zerman, J. Napoleon	37

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CHARLES ELMORE CR
CL

No. 694

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

No. 5596. January Term, 1932.

THE UNITED STATES OF AMERICA,
Appellant,

v.

GEORGE OTIS SMITH,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Before MARTIN, *Chief Justice,* and ROBB, VAN ORSDEL, HITZ and GRONER, *Associate Justices.*

CERTIFICATE TO THE SUPREME COURT OF THE UNITED STATES.

The Court of Appeals of the District of Columbia hereby certifies that there is pending in that court a cause on appeal from the Supreme Court of the District of Columbia in which the United States of America prayed that a writ of *quo warranto* issue to determine the right of George Otis Smith to hold the offices of member and Chairman of the Federal Power Commission. The record discloses the following facts material to this certificate:

By an act of the Congress of the United States approved the twenty-third day of June, 1930, amend-

ing an act approved on the tenth day of June, 1920, there was created and established a commission known as the Federal Power Commission, composed of five commissioners appointed by the President, by and with the advice and consent of the Senate, one of whom is designated by the President as chairman.

In pursuance of this statute and of the applicable provisions of the Constitution of the United States, the President, on the third day of December, 1930, transmitted to the Senate of the United States the nomination of one George Otis Smith of Maine as a member of the Federal Power Commission for the term expiring on the twenty-second day of June, 1935, said nomination being transmitted by letter in form as follows:

"The White House, December 3, 1930.

TO THE SENATE OF THE UNITED STATES:

I nominate the following-named persons to be members of the Federal Power Commission for the terms herein designated as follows:

For the term expiring June 22, 1935, George Otis Smith, of Maine.

For the term expiring June 22, 1934, Frank R. McNinch, of North Carolina.

For the term expiring June 22, 1933, Ralph B. Williamson, of Washington.

For the term expiring June 22, 1932, Marcel Garsaud, of Louisiana.

For the term expiring June 22, 1931, Claude L. Draper, of Wyoming.

HERBERT HOOVER."

Said letter of nomination has at all times since remained in the physical possession of the Senate of the United States.

In accordance with the rules of the Senate, the nomination of the said George Otis Smith was duly referred to the Committee on Interstate Commerce, which said Committee held hearings and deliberated concerning the character, ability and qualifications of the said George Otis Smith for the office to which he had been so nominated, and thereafter, on the fifteenth day of December, 1930, reported favorably to the Senate the name of the said George Otis Smith for the office to which he had been so nominated.

On the twentieth day of December, 1930, the Senate, in open executive session, undertook the consideration of the said nomination, and the following proceedings were had with reference thereto, to wit:

The presiding officer (Mr. Fess in the chair), stated the pending question, which was as follows:

> "Shall the Senate advise and consent to the appointment of George Otis Smith, to be a member of the Federal Power Commission?"

On the question of agreeing thereto, yeas and nays were demanded by Mr. Dill, a Senator from the State of Washington, and the demand being supported by one-fifth of the Senators present the roll was called whereupon thirty-eight Senators were found to have voted in the affirmative and twenty-two in the negative and thirty-five not voting. So it was accordingly

> "RESOLVED, That the Senate advise and consent to the appointment of the above named person to the office named agreeably to his said nomination."

Upon the announcement of the result of the vote so had the President *pro tempore* stated:

> "The Senate advises and consents to the nomination and the President will be notified";

Following the announcement by the Presiding Officer of the advice and consent of the Senate to the appointment of George Otis Smith no objection was made by any Senator to the statement of the Presiding Officer that "the President will be notified"; the statement so made became as if by unanimous consent an order of the Senate to their Secretary.

Thus, the following order was entered by the Secretary of the Senate in usual course upon the Executive Journal of the Senate for the said twentieth day of December, 1930, to wit:

> "ORDERED, that the foregoing resolution of confirmation be forwarded to the President of the United States."

And thereafter further proceedings having been had on the said day in the said Executive Session with reference to other nominations then pending before the Senate, it was,

> "ORDERED, that all resolutions of confirmation this day agreed to be forwarded forthwith to the President of the United States."

Upon the announcement of said order by the President *pro tempore*, no Senator objected to the order so announced and the order so made became as if by unanimous consent an order of the Senate to their Secretary and was duly entered upon the Executive Journal of the Senate for the said day and date in the form announced.

Upon the making of said orders it became and was the duty of the Secretary of the Senate under the rules of the Senate, forthwith to notify the President that advice and consent had been given to the appointment of the respondent, without awaiting the expiration of the second subsequent day of actual executive session.

On the said twentieth day of December, 1930, the same day on which the Senate so voted to advise and consent to the appointment of the said George Otis Smith, it thereafter adjourned in accordance with a concurrent resolution passed by the two Houses of Congress until 12.00 M., Monday, the fifth day of January, 1931.

On Monday, the twenty-second day of December, 1930, the Secretary of the Senate delivered by official messenger to the President of the United States the following communication, to wit:

"IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES.

Saturday, December 20, 1930.

RESOLVED, That the Senate advise and consent to the appointment of the following-named persons to the offices named agreeably to their respective nominations:

FEDERAL POWER COMMISSION.

George Otis Smith, to be a member for the term expiring June 22, 1935.

Frank R. McNinch, to be a member for the term expiring June 22, 1934.

Marcel Garsaud, to be a member for the term expiring June 22, 1932.

Attest:

(Signed) EDWIN P. THAYER,
Secretary."

Thereupon the President of the United States, on the twenty-second day of December, 1930, signed and delivered, through the Department of State, a commission to the said George Otis Smith, purporting to appoint him a member of the Federal Power Commission and designated him Chairman thereof; and the said George Otis Smith, forthwith and upon the same day

and date took the oath of office prescribed by law as such member of the Federal Power Commission and Chairman thereof, and undertook to assume and enter upon the discharge of the duties of said office, and has thence hitherto so continued.

The Standing Rules of the Senate, being Nos. 38 and 39 of the same during the period December 3, 1930, to February 7, 1931, were in form as follows:

"RULE XXXVIII

Executive Session—Proceedings on Nominations.

1. When nominations shall be made by the President of the United States to the Senate, they shall, unless otherwise ordered, be referred to appropriate committees; and the final question on every nomination shall be, 'Will the Senate advise and consent to this nomination?' which question shall not be put on the same day on which the nomination is received, nor on the day on which it may be reported by a committee, unless by unanimous consent.

2. Hereafter all business in the Senate shall be transacted in open session, unless the Senate in closed session by a majority vote shall determine that a particular nomination, treaty, or other matter shall be considered in closed executive session, in which case all subsequent proceedings with respect to said nomination, treaty, or other matter shall be kept secret: *Provided,* That the injunction of secrecy as to the whole or any part of proceedings in closed executive session may be removed on motion adopted by a majority vote of the Senate in closed executive session; *Provided further,* That Rule XXXV shall apply to open executive sessions: *And provided further,* That any Senator may make public his vote in closed executive session.

Anything in the rules of the Senate inconsistent with the foregoing is hereby repealed.

3. When a nomination is confirmed or rejected, any Senator voting in the majority may move for a reconsideration on the same day on which the vote was taken, or on either of the next two days of actual Executive session of the Senate; but if a notification of the confirmation or rejection of a nomination shall have been sent to the President before the expiration of the time within which a motion to reconsider may be made, the motion to reconsider shall be accompanied by a motion to request the President to return such notification to the Senate. Any motion to reconsider the vote on a nomination may be laid on the table without prejudice to the nomination, and shall be a final disposition of such motion.

4. Nominations confirmed or rejected by the Senate shall not be returned by the Secretary to the President until the expiration of the time limited for making a motion to reconsider the same, or while a motion to reconsider is pending, unless otherwise ordered by the Senate.

5. When the Senate shall adjourn or take a recess for more than thirty days, all motions to reconsider a vote upon a nomination which has been confirmed or rejected by the Senate, which shall be pending at the time of taking such adjournment or recess, shall fall; and the Secretary shall return all such nominations to the President as confirmed or rejected by the Senate, as the case may be.

6. Nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President; and if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President.

RULE XXXIX.

The President Furnished With Copies of Records of Executive Sessions.

The President of the United States shall, from time to time, be furnished with an authenticated transcript of the Executive records of the Senate, but no further extract from the Executive Journal shall be furnished by the Secretary, except by special order of the Senate; and no paper except original treaties transmitted to the Senate by the President of the United States, and finally acted upon by the Senate, shall be delivered from the office of the Secretary without an order of the Senate for that purpose."

Pursuant to its adjournment had on the twentieth day of December, 1930, the Senate reconvened on the fifth day of January, 1931, and on that day went into open executive session; thereupon one Thomas J. Walsh, a Senator from the State of Montana, who on the twentieth day of December, 1930, had voted in the majority upon the question of advising and consenting to the appointment of the said George Otis Smith as a member of the Federal Power Commission, moved that the vote of the Senate taken as aforesaid, by which the Senate advised and consented to the said nomination of the said George Otis Smith, be reconsidered, and accompanied said motion with a motion that the President be requested to return to the Senate the notification theretofore transmitted to him in that regard, which said motions were so made on the next day of actual executive session of the Senate after the original vote upon said nomination had been taken.

On the ninth day of January, 1931, the President *pro tempore*, under an agreement for unanimous consent, put to the vote of the Senate the motion so made and pending for reconsideration of the vote whereby the Senate had advised and consented to the appoint-

ment of the said George Otis Smith, and the motion prevailed by a vote of yeas, 44; nays, 37; not voting, 15; whereupon the President *pro tempore* put to the further vote of the Senate the motion so made and pending to request the President to return to the Senate the notification theretofore sent to him by the Secretary of the Senate on the twenty-second day of December, 1930, as aforesaid, which motion prevailed by a similar vote. And thereupon the Secretary of the Senate forthwith forwarded to the President an authenticated transcript of the resolution requesting the return of the notification theretofore sent to him as aforesaid.

On the tenth day of January, 1931, the President *pro tempore* laid before the Senate a message from the President of the United States reading as follows:

"To the Senate of the United States:

I am in receipt of the resolution of the Senate dated January 5, 1931—

> That the President of the United States be respectfully requested to return to the Senate the resolution advising and consenting to the appointment of George Otis Smith to be a member of the Federal Power Commission, which was agreed to on Saturday, December 20, 1930.

I have similar resolutions in respect to the appointment of Messrs. Claude L. Draper and Col. Marcel Garsaud.

On December 20, 1930, I received the usual attested resolution of the Senate, signed by the Secretary of the Senate, as follows:

> *Resolved*, That the Senate advise and consent to the appointment of the following-named person to the office named agreeably to his nomination:

FEDERAL POWER COMMISSION.

George Otis Smith, to be a member of the Federal Power Commission.

I received similar resolutions in respect to Colonel Garsaud and Mr. Draper.

I am advised that these appointments were constitutionally made, with the consent of the Senate formally communicated to me, and that the return of the documents by me and reconsideration by the Senate would be ineffective to disturb the appointees in their offices. I can not admit the power in the Senate to encroach upon the Executive functions by removal of a duly appointed executive officer under the guise of reconsideration of his nomination.

I regret that I must refuse to accede to the requests.

HERBERT HOOVER.

THE WHITE HOUSE, January 10, 1931."

On the tenth of January, 1931, the said Thomas J. Walsh, a Senator as aforesaid, made a motion in the Senate of the United States to direct the Executive Clerk of the Senate to place on the Executive calendar for the action of the Senate the name and nomination of the said George Otis Smith, which motion was agreed to by a vote of the Senate as follows: yeas, 36; nays, 23; not voting, 37; and thereupon the President *pro tempore* made order accordingly.

Thereafter, on the twenty-third day of January, 1931, the President *pro tempore* of the Senate, in open executive session, put to a vote a motion by the said Thomas J. Walsh, a Senator as aforesaid, that the nomination of George Otis Smith, of Maine, for the office of member of the Federal Power Commission be recommitted to the Committee on Interstate Commerce for its consideration, which motion prevailed by the following vote: yeas, 45; nays, 32; not voting, 19.

11

Thereafter, on the third day of February, 1931, one James Couzens, a Senator from the State of Michigan, acting for and on behalf of the Committee on Interstate Commerce, reported to the Senate without recommendation the nomination of the said George Otis Smith for the office of member of the Federal Power Commission, and the name and nomination of said George Otis Smith was thereupon ordered to be placed on the Executive Calendar for the further action of the Senate.

Thereafter on the fourth day of February, 1931, when the name and nomination of said George Otis Smith, of Maine, to be a member of the Federal Power Commission was read, the President *pro tempore* stated the question as follows:

> "Will the Senate advise and consent to the appointment of George Otis Smith to be a member of the Federal Power Commission, for a term expiring June 19, 1935?"

On the question of agreeing thereto, the yeas and nays having been demanded, the roll of the Senate, was called, and 33 Senators voting in the affirmative and 40 Senators voting in the negative and 23 Senators not voting, it was

> "RESOLVED, That the Senate do not advise and consent to the appointment of George Otis Smith, to be a member of the Federal Power Commission, for a term expiring June 19,* 1935."

Thereafter, on the seventh day of February, 1931, two days of actual executive session of the Senate having transpired since the action last aforesaid, the Secretary of the Senate delivered by messenger to the President of the United States a notice of the rejection of the said nomination in form as follows:

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*By clerical error stated to be June 19, 1935, instead of June 22, 1935, as the fact was.

"REJECTION.

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES.

Wednesday, February 4 (Legislative Day, Monday, January 26), 1931.

RESOLVED, That the Senate do not advise and consent to the appointment of the following-named person:

FEDERAL POWER COMMISSION.

George Otis Smith, of Maine, to be a member of the Federal Power Commission, for the term expiring June 22, 1935.

(Signed) EDWIN P. THAYER."

The Supreme Court of the District of Columbia heard the case on petition and answer and upon a stipulation of counsel embodying the Reconsideration Rules of the United States Senate from February 25, 1790, to date and numerous historical precedents thereunder, which precedents were taken from the Senate Executive Journal, records of the White House and records of Departments concerned.

On December 22, 1931, that court entered its order dismissing the petition for a writ of quo warranto, to which action of the court the petitioner took exception, and noted an appeal to the Court of Appeals of the District of Columbia.

QUESTION CERTIFIED.

In order that this court may be advised as to the proper disposition of this cause, and to the end that a correct result may be reached, the court desires the instruction of the Supreme Court of the United States upon the following question:

Upon the foregoing undisputed facts, was, or was not, the said George Otis Smith appointed by the President by and with the advice and consent of the Senate as a member of the Federal Power Commission, and duly designated as Chairman thereof?

Respectfully submitted,

GEORGE E. MARTIN,
Chief Justice.
CHARLES H. ROBB,
Associate Justice.
WILLIAM HITZ,
Associate Justice.
D. LAWRENCE GRONER,
Associate Justice.

Supreme Court of the United States

No. 694, October term, 1931

THE UNITED STATES OF AMERICA

vs.

GEORGE OTIS SMITH

Order granting motion to bring up entire record and cause

February 23, 1932

On consideration of the joint motion to bring up the entire record and cause and of the joint motion to advance this cause,

It is ordered by the court that the said motions be, and the same are hereby, granted, and the case is assigned for argument on Monday, March 21 next, after the case heretofore assigned for that day.

And it is further ordered that the motion of the Attorney General and Solicitor General of the United States for leave to participate in the oral argument of this case be granted as prayed.

FILE COPY

No. 494.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

UNITED STATES OF AMERICA, APPELLANT (BELOW),

v.

GEORGE OTIS SMITH, APPELLEE (BELOW).

ON CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

JOINT MOTION TO ADVANCE.

JOHN W. DAVIS,
ALEXANDER J. GROESBECK,
Counsel for Appellant.

GEORGE WHARTON PEPPER,
Counsel for Appellee.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1931.

No. 694.

UNITED STATES OF AMERICA, APPELLANT (BELOW),

v.

GEORGE OTIS SMITH, APPELLEE (BELOW).

ON CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

JOINT MOTION TO ADVANCE.

The United States of America, appellant below, and George Otis Smith, appellee below, in the above-entitled cause, move that this case be advanced for early hearing, and in support of this motion make the following brief statement of the matter involved, and the reasons relied upon for the advancement:

The United States of America petitioned the Supreme Court of the District of Columbia for a writ of *quo warranto* to determine the right of one George Otis Smith to hold the offices of member and chairman of the Federal Power Commission. The cause was heard on Petition and Answer and upon a Stipulation of Counsel embodying the Rules of the United States

Senate governing reconsideration from February 25, 1790, to date, and numerous historical precedents thereunder, which precedents were taken from the Executive Journal of the Senate, the records of the Executive Offices of the White House, and the records of the executive departments concerned.

On December 22, 1931, the Supreme Court of the District of Columbia entered its order dismissing the petition for a writ of *quo warranto,* to which action of the Court the United States of America took exception and noted an appeal to the Court of Appeals of the District of Columbia. On February 12th, 1932, the Court of Appeals of the District of Columbia, in which Court said appeal is pending, filed a certificate with your Honorable Court stating a definite and distinct legal question on which it desired the instruction of the Supreme Court of the United States, and stating the facts deemed material to the decision of such question.

The parties to this cause are desirous, in the interest of justice, of effecting a speedy termination of said cause and settlement of the questions therein raised, for the following reasons:

1. The case presents questions of great public interest involving the construction of provisions of the Constitution of the United States, and the delimitation of the respective powers of the President and the Senate of the United States in connection with the making of appointments by and with the advice and consent of the Senate.

2. In this action the right of George Otis Smith, Appellee below, to act as a member of the Federal Power Commission is challenged by the United States of America.

3. Many questions of great public importance are continually being presented to the Federal Power Commission, and it thus becomes a matter of vital public interest to determine speedily the validity of the chairman's title to the office, the duties of which he is actually discharging.

Wherefore, the United States of America, Appellant below, and George Otis Smith, Appellee below, pray that the case be advanced upon the calendar and assigned for hearing at an early date at the convenience of the Court.

Respectfully submitted,

JOHN W. DAVIS,

ALEXANDER J. GROESBECK,
Counsel for Appellant.

GEORGE WHARTON PEPPER,
Counsel for Appellee.

FILE COPY

FEB 1 8 1932

CHARLES ELMORE CROPLEY

No. 694.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

UNITED STATES OF AMERICA, APPELLANT (BELOW),

v.

GEORGE OTIS SMITH, APPELLEE (BELOW).

ON CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

JOINT MOTION TO BRING UP THE ENTIRE RECORD

JOHN W. DAVIS,
ALEXANDER J. GROESBECK,
Counsel for Appellant.
GEORGE WHARTON PEPPER,
Counsel for Appellee.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1931.

No. 694.

UNITED STATES OF AMERICA, APPELLANT (BELOW),

v.

GEORGE OTIS SMITH, APPELLEE (BELOW).

ON CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

JOINT MOTION TO BRING UP THE ENTIRE RECORD.

Now come the United States of America, appellant, and George Otis Smith, appellee, in this cause in the Court of Appeals of the District of Columbia, now pending in this Court on questions certified by the Court of Appeals, and move that this Honorable Court issue its writ of certiorari commanding that court to certify and send to this Court the entire record in this cause, in order that this Court may consider and decide the whole matter in controversy as upon appeal pursuant to Section 239 of the Judicial Code, as amended by the Act of February 13, 1925, and Rule 37 of the Rules of this Court.

A certified transcript of the record in this case and nine printed copies thereof have been lodged with the Clerk of this Court as exhibits to this motion.

This was an action in *quo warranto* commenced in the Supreme Court of the District of Columbia by the United States of America against George Otis Smith, to determine the right of George Otis Smith to hold the offices of member and chairman of the Federal Power Commission. From a judgment in favor of the respondent, the United States duly appealed to the Court of Appeals of the District of Columbia, which court by certificate filed February 12th, 1932, has certified to this Court the following question:

> Upon the foregoing undisputed facts [contained in the certificate] was, or was not, the said George Otis Smith appointed by the President by and with the advice and consent of the Senate as a member of the Federal Power Commission, and duly designated as Chairman thereof?

It is thought that the entire record will supply the Court with information which is not available in the certificate alone, and which will be of material assistance to the Court in reaching its decision. The record contains a stipulation of counsel, embodying the reconsideration rules of the United States Senate from 1790 to date, and numerous historical precedents thereunder taken from the Executive Journal of the Senate, the records of the Executive Offices of the White House, and the records of the Executive Departments concerned. This stipulation contains an exhaustive com-

pilation of historical precedents gathered together in convenient form. This material was considered by the court below and was accordingly made a part of the record in the cause.

The case was tried before the Supreme Court of the District of Columbia upon petition and answer, together with the stipulation above referred to. The stipulation occupies 81 printed pages of the record. The rest of the record consists of the pleadings, the opinion of the court, the judgment, and the papers filed in connection with the appeal. If the record is brought up the Court will not be required to read any extended notes of testimony, but will have before it only undisputed facts which may prove of assistance in the final determination of the case.

Wherefore, the parties hereto jointly pray that this Honorable Court issue its writ of certiorari commanding the Court of Appeals of the District of Columbia to certify and send to this Court the entire record in this case, in order that this Court may consider and decide the whole matter in controversy as upon appeal.

Respectfully submitted,

JOHN W. DAVIS,

ALEXANDER J. GROESBECK,
Counsel for Appellant (below).

GEORGE WHARTON PEPPER,
Counsel for Appellee (below).

February, 1932.

FILE COPY

No. 694

FILED
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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1931.

THE UNITED STATES OF AMERICA,
Appellant (Petitioner),

against

GEORGE OTIS SMITH,
Appellee (Respondent).

ON CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANT.

JOHN W. DAVIS,
ALEXANDER J. GROESBECK,
Counsel for the United States Senate.

On the Brief:
CHARLES POLETTI.

THE BALLOU PRESS NEW YORK

TABLE OF CONTENTS.

	PAGE
OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED	3
SENATE RULES INVOLVED	3
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	12
POINT I.	14

Rules XXXVIII and XXXIX of the Standing Rules of the Senate by their explicit terms empowered the Senate to entertain a motion, made before the expiration of the next two days of actual executive session, to reconsider its vote advising and consenting to the appointment of the appellee, even though the President had been formally notified of such consent.

The order of the Senate that a resolution of confirmation be forwarded forthwith to the President did not preclude reconsideration by the Senate within two days of actual executive session next succeeding the vote of confirmation	18
The notification of the President was not tantamount to a warrant to proceed forthwith to issue a commission, the opinion of the Attorney General to the contrary notwithstanding	27
The President was chargeable with knowledge that the Senate retained its right to reconsider	34
The power of reconsideration is not lost simply because the President has acted before the request for the return of the notification is received	36

PAGE

The Senate's power to reconsider is not checkmated by the refusal of the President to return the notification requested by the Senate..... 39

Presidential and Senatorial practice do not support the contention either that the power to reconsider is truncated by an immediate appointment by the President or that it is checkmated by his refusal to return the notification..... 46

POINT II..... 71

In adopting Rules XXXVIII and XXXIX the Senate did not exceed the power vested in it by Article I, Section 5, of the Constitution. The Rules are binding on both the Senate and the Executive.

In Rules XXXVIII and XXXIX there is a "reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained"..... 75

Rules XXXVIII and XXXIX do not "ignore constitutional restraints or violate fundamental rights"..... 80

POINT III..... 83

The signing and delivery of a commission and the taking of an oath by the appellee cannot fortify his position or shield him from ouster.

CONCLUSION..... 96

The judgment of the Supreme Court of the District of Columbia should be reversed and the appellant should be granted a writ of *quo warranto* to oust and exclude the appellee from the office of member and Chairman of the Federal Power Commission.

APPENDIX A..... 97

Dates of Legislative and Executive Sessions of the Senate during the Third session of Seventy-first Congress.

Table of Cases Cited.

	PAGE
Allen v. Morton, 94 Ark. 405; 127 S. W. 450 (1910)	94
Ashton v. City of Rochester, 133 N. Y. 187; 30 N. E. 965 (1892)	93
Attorney General, Opinions of, Vol. 4, p. 217	15
Attorney General, Opinions of, Vol. 36	27, 46
Baker v. Cushman, 127 Mass. 105 (1879)	94
Ball v. United States, 140 U. S. 118	95
Board of Education of Boyle County v. McChesney, 235 Ky. 692; 32 S. W. (2nd Series) 26 (1930)	94
Boudinot v. United States (Cherokee Tobacco), 11 Wall. 616	77
City of Kankakee v. Small, 317 Ill. 55; 147 N. E. 404 (1925)	94
Comm. of Immigration v. Gottlieb, 265 U. S. 310	36
Commonwealth v. Allen, 128 Mass. 308 (1880)	93
Conger v. Gilmer, 32 Cal. 75 (Supreme Court, 1867)	92
Crawford v. Gilchrist, 64 Fla. 41; 59 So. 963; 32 Ann. Cas. 916 (1912)	74, 75, 82, 84, 89, 91
Davies v. City of Saginaw, 87 Mich. 439; 49 N. W. 667 (1891)	38
Dust v. Oakman, 126 Mich. 717; 86 N. W. 151 (1901)	84, 91
Evans v. Jordan, 9 Cranch 199	77
Ex parte Henry Ward, 173 U. S. 452	95
Ex parte Kearney, 7 Wheat. 38	77
French v. Senate and State of California, 146 Calif. 604; 80 Pac. 1031 (1905)	38
Glavey v. United States, 182 U. S. 595	48
Haight v. Love, 39 N. J. L. 14 (1876)	94
Higgins v. Curtis, 39 Kan. 283; 18 Pac. 207 (1888)	93
Hussey v. Smith, 99 U. S. 20	95
In re Fitzgerald, 88 App. Div. 434; 82 N. Y. Supp. 811, Affd. 84 N. Y. Supp. 1125 (1903)	93
In re Manning, 139 U. S. 504	95

PAGE

Lewis v. United States, 92 U. S. 618 36
Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283 ... 77
Marbury v. Madison, 1 Cranch 137 ..... 15, 47
McCulloch v. State of Maryland, 4 Wheat. 316; 17 U. S. 315 73
McDowell v. United States, 159 U. S. 596 95
Myers v. United States, 272 U. S. 52 81
People ex rel. Birch v. Mills, 32 Hun (N. Y.) 459 (1884) 82
People ex rel. Locke v. Common Council of the City of Rochester, 5 Lans. (N. Y.) 11 (1871) 39, 74, 76
People ex rel. MacMahon v. Davis, 284 Ill. 439; 120 N. E. 326; 2 A. L. R. 1650 (1918) 83, 85
People v. Shawver, 30 Wyo. 366, 222 Pac. 11 (1924) ... 93
Red v. City Council of Augusta, 25 Georgia 386 (1857) . 93
Reed v. School Commission, 176 Mass. 473; 57 N. E. 961 (1900) 92
Smith v. Jennings, 67 S. C. 324; 45 S. E. 821 (1903) . . 39, 74
State ex rel. Burdick v. Tyrrell, 158 Wis. 425; 149 N. W. 280 (1914) 94
State ex rel. Childs v. Wadhams, 64 Minn. 318; 67 N. W. 64 (1896) 93, 94
State ex rel. Coogan v. Barbour, 53 Conn. 76; 22 Atl. 686 (1885) 93
State ex rel. Gouldey v. City Council of Atlantic City, 63 N. J. L. 537; 42 Atl. 852 (1899) 93
State ex rel. West v. Butler, 70 Fla. 102; 69 So. 771 (1915) 38, 74, 91
State ex rel. Whitney v. Buskirk, 40 N. J. L. 463 (1878) 38, 93, 94
State v. Foster, 7 N. J. L. 123 (1823) 93
State v. New London Savings Bank, 79 Conn. 141; 64 Atl. 55 (1906) 38, 74, 82, 92
State v. Phillips, 79 Me. 506; 11 Atl. 274 (1887) 94
Stiles v. City of Lambertville, 73 N. J. L. 90; 62 Atl. 288 (1905) 93

PAGE

United States v. Ballin, 144 U. S. 1 ..... 72, 74
United States v. Bradley, 10 Pet. 343 48
United States v. Delaware & Hudson Co., 213 U. S. 366. 77
United States v. Ewing, 184 U. S. 140 36
United States v. LeBaron, 19 How. (U. S.) 73 48
United States v. Linn, 15 Pet. 290 48
United States v. Rollins, 130 U. S. 662 36
United States v. Stewart, 19 How. (U. S.) 79 48
Witherspoon v. State ex rel. West, 138 Miss. 310; 103 So. 134 (1925) 38, 76, 82, 83, 87
Wood v. Cutter, 138 Mass. 149 (1884) 83, 89, 94
Yerke v. United States, 173 U. S. 439 36

U. S. Constitution and Statutes.

Constitution of the United States, Article I, Section 5 ..... 13, 16, 72
Constitution of the United States, Article I, Section 7 ..... 17, 41
Constitution of the United States, Article II, Section 2 14
Constitution of the United States, Article II, Section 3 14
District of Columbia Code, Title 24, Part III, § 232 1
Judicial Code § 239 3
41 Statutes at Large 1063 5
46 Statutes at Large 797 ..... 5, 34
United States Code, Title 4, Section 5 35
United States Code, Title 5, Sections 11 and 12 35
United States Code, Title 5, Section 16 84

Present Senate Standing Rules Cited.

Senate Rule XIII 29, 33
Senate Rule XXXVIII 3, 8, 9, 12, 14 15, 19, 24, 27, 28, 31, 33, 36, 37, 39, 41, 44, 71, 73, 75, 78, 80, 88

PAGE

Senate Rule XXXIX.....5, 8, 12, 14, 15, 41, 71, 73, 75, 78, 80

Senate Rule XL.....26

Senate Precedents Cited.

Austin, Horace..... 52
Barnes, Joseph K.....21, 22, 49
Bean, John W..... 55
Bliss, E. Raymond..... 60
Boseman, B. A..... 68
Buck, Norman..... 52
Chandler, Green C..... 52
Clark, John W..... 60
Clum, John P..... 52
Colby, J. C. S.....32, 68, 69, 71
Du Barry, Edmund L..... 20
Durkee, Joseph H..... 61
Fisk, A. C.....20, 23, 24, 44, 46, 49, 51
Frost, Westley.....21, 22, 23, 24, 46, 49, 50
Goddard, John H.....21, 22, 49, 50
Heath, H. H.....21, 22, 49, 50
Hill, Issac.....20, 23, 24, 46
Jeffries, Noah L..... 54
Knight, Alva A..... 58
Kursheedt, Edwin I..... 63
Legate, James F..... 56
Marks, Morris.....32, 68, 70
Miles, Laban J..... 61
Nourse, George..... 57
Pierce, Benjamin K..... 20
Plimley, William..... 64
Pollock, Samuel M..... 53

PAGE

Pritchard, George W. 62
Reeves, Thomas H. 63
Scott, Lewis A. 55
Shannon, Peter C. 59
Shumard, Belle C. 59
Tubbs, William H. 52, 60
Whiting, Levi 20

Records of Senatorial Proceedings.

Annals of Congress, First Congress 16, 17
Congressional Record, Seventy-first Congress, Third Session 7
Executive Journal of the Senate, Vol. 16 54
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Hinds, Precedents of the House of Representatives .. 17, 30, 33, 45
Jefferson, Thomas, Manual of Parliamentary Procedure 17, 39, 40, 76
Luce, Robert, Legislative Procedure 17, 33
Redlich, Josef, Procedure of the House of Commons 17
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Willoughby, On the Constitution of the United States .. 15

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1931.

THE UNITED STATES OF AMERICA,
Appellant (Petitioner),

against

GEORGE OTIS SMITH,
Appellee (Respondent).

ON CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANT.

Opinion Below.

The case came before the Supreme Court of the District of Columbia on a petition for a writ of *quo warranto* filed by the United States Attorney for the District of Columbia, pursuant to the Code of the District of Columbia, Title 24, Part III, Section 232 thereof, and answer filed by the appellee thereto. The parties submitted at the argument a pamphlet entitled "Senate Precedents." This contained a list of precedents for the reconsideration by the Senate of its vote confirming or rejecting a nomination after the notification of the President of its action thereon. The Supreme Court in an opinion filed December 5, 1931, denied the petition (R. 11). The opinion is not yet reported. The pamphlet, Senate Precedents, was filed with the opinion (R. 18).

Prior to the entry of the order on the opinion the parties, by stipulation, submitted additional information concerning Presidential and Senatorial practice in cases of reconsideration of nominations. This stipulation was labelled "Agreement of Counsel in Regard to Facts Concerning Nomination, Confirmation and the Issuance of Commissions in Specific Cases, as Shown by the Senate Executive Journal, by Records of the Executive Offices of the White House, and in Certain Instances by Departmental Records," and was made a part of the record of the Court below by an order entered December 14, 1931.

Jurisdiction.

On December 22, 1931, the Supreme Court of the District of Columbia entered an order that the petition for a writ of *quo warranto* be denied with costs to be paid by the petitioner (R. 112). On the same day the appellant in open court noted an appeal to the Court of Appeals (R. 112). On December 29, 1931, the appellant filed its assignment of errors (R. 112) and the designation of the record (R. 114).

On January 22, 1932, the record was filed with the Court of Appeals and the case noted for trial at the January Term. At the same time there was filed with the Court of Appeals a stipulation by both counsel that the Clerk of the Court of Appeals, in printing the record transmitted to him by the Supreme Court, should, in lieu of printing separately the pamphlet, Senate Precedents, made a part of the record of the Supreme Court by the opinion filed therein on December 5, 1931 and the stipulation of counsel made a part of the record by order of the Supreme Court entered on December 14, 1931, print the pamphlet and stipulation as one document in the form to be prepared and submitted upon agreement to the Clerk of the Court of Appeals by both counsel. This compilation appears in the record now before this Court as Senate, White House and Departmental Precedents (R. 31-112).

Subsequently, the Court of Appeals, pursuant to Section 239 of the Judicial Code, certified a question to this Court. On February 11 the certificate was signed and filed in the Court of Appeals. On February 12 it was filed in this Court, and on February 15, a joint motion to bring up the entire record and a joint motion to advance the cause were made before this Court (R. 123). These motions were granted on February 23 (R. 137).

Question Presented.

This is a proceeding for a writ of *quo warranto* to oust and exclude the appellee from the office of member and Chairman of the Federal Power Commission on the ground that the Senate of the United States has at no time advised and consented to the appointment of the appellee to the said office.

The sole question presented upon this appeal is one of law, namely, had the Senate the power to reconsider on the next day of executive session its vote advising and consenting to the appointment of the appellee even though in the meantime the resolution of consent had been ordered sent to the President, a commission had been issued to the appellee and the oath of office had been taken by him.

The Supreme Court of the District of Columbia denied the petition for a writ of *quo warranto* holding that the Senate did not under such circumstances have the power to reconsider its advice and consent to the nomination of the appellee and subsequently to refuse to advise and consent thereto.

Senate Rules Involved.

RULE XXXVIII.

EXECUTIVE SESSION—PROCEEDINGS ON NOMINATIONS.

1. When nominations shall be made by the President of the United States to the Senate, they shall, unless otherwise ordered, be referred to appropriate commit-

tees; and the final question on every nomination shall be, "Will the Senate advise and consent to this nomination?" which question shall not be put on the same day on which the nomination is received, nor on the day on which it may be reported by a committee, unless by unanimous consent.

2. Hereafter all business in the Senate shall be transacted in open session, unless the Senate in closed session by a majority vote shall determine that a particular nomination, treaty, or other matter shall be considered in closed executive session, in which case all subsequent proceedings with respect to said nomination, treaty, or other matter shall be kept secret: *Provided,* That the injunction of secrecy as to the whole or any part of proceedings in closed executive session may be removed on motion adopted by a majority vote of the Senate in closed executive session: *Provided further,* That Rule XXXV shall apply to open executive sessions: *And provided further,* That any Senator may make public his vote in closed executive session.

Anything in the rules of the Senate inconsistent with the foregoing is hereby repealed.

3. When a nomination is confirmed or rejected, any Senator voting in the majority may move for a reconsideration on the same day on which the vote was taken, or on either of the next two days of actual Executive session of the Senate; but if a notification of the confirmation or rejection of a nomination shall have been sent to the President before the expiration of the time within which a motion to reconsider may be made, the motion to reconsider shall be accompanied by a motion to request the President to return such notification to the Senate. Any motion to reconsider the vote on a nomination may be laid on the table without prejudice to the nomination, and shall be a final disposition of such motion.

4. Nominations confirmed or rejected by the Senate shall not be returned by the Secretary to the President until the expiration of the time limited for making a motion to reconsider the same, or while a motion to reconsider is pending, unless otherwise ordered by the Senate.

5. When the Senate shall adjourn or take a recess for more than thirty days, all motions to reconsider a vote upon a nomination which has been confirmed or rejected by the Senate, which shall be pending at the time of taking such adjournment or recess, shall fall; and the Secretary shall return all such nominations to the President as confirmed or rejected by the Senate, as the case may be.

6. Nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President; and if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President.

RULE XXXIX.

The President Furnished With Copies of Records of Executive Sessions.

The President of the United States shall, from time to time, be furnished with an authenticated transcript of the Executive records of the Senate, but no further extract from the Executive Journal shall be furnished by the Secretary, except by special order of the Senate; and no paper, except original treaties transmitted to the Senate by the President of the United States, and finally acted upon by the Senate, shall be delivered from the office of the Secretary without an order of the Senate for that purpose.

Statement of the Case.

Congress by an act approved June 23, 1930 (46 Stat. 797) amending an act passed on June 10, 1920 (41 Stat. 1063) created and established a commission to be known as the Federal Power Commission, composed of five commissioners to be appointed by the President by and with the advice and

consent of the Senate. The Act empowers the President to designate one of the commissioners as chairman to serve as the principal executive officer of the Commission. The Act also provides that the first commissioners who are appointed under it shall continue in office for terms of one, two, three, four and five years, respectively, from June 23, 1930, the term of each commissioner to be designated by the President at the time of nomination. The principal office of the Commission shall be in the District of Columbia where its general sessions shall be held.

On December 3, 1930, the President of the United States, pursuant to the Act of June 23, 1930, transmitted to the Senate of the United States the nomination of the appellee as a member of the Federal Power Commission for the term expiring on June 22, 1935. The nomination was transmitted by letter in the customary manner. Since then this letter has at all times remained in the custody and possession of the Senate.

In accordance with the Standing Rules of the Senate, the nomination of the appellee was duly referred to the Committee on Interstate Commerce. After hearings and deliberation concerning the ability, character and qualification of the nominee for the office of member of the Federal Power Commission, the Committee favorably reported his nomination to the Senate on December 15, 1930.

On December 20, 1930, the Senate, in open executive session, undertook the consideration of the nomination. At that time the presiding officer stated the pending question as follows:

> "Shall the Senate advise and consent to the appointment of George Otis Smith, to be a member of the Federal Power Commission?"

On the question of agreeing thereto, yeas and nays were demanded by one Clarence C. Dill, a Senator from the State of Washington, and the demand being supported by one-fifth of the Senators present the roll was called, whereupon 38

Senators were found to be voted in the affirmative and 22 in the negative and 35 not voting. So it was accordingly

> "RESOLVED, That the Senate advise and consent to the appointment of the above named person to the office named agreeably to his said nomination."

Upon the announcement of the result of the vote the President *pro tempore* stated:

> "The Senate advises and consents to the nomination and the President will be notified."

Since no objection was made or further proceedings had by the Senate with reference to the consent to this appointment or to the notification of the President, the Secretary of the Senate in usual course entered upon the Executive Journal of the Senate for December 20, 1930, the following:

> "ORDERED, that the foregoing resolution of confirmation be forwarded to the President of the United States."

The Senate thereafter considered other nominations pending before it. At the end of the record of the proceedings of the executive session held on that day, the Secretary of the Senate entered the following order:

> "ORDERED, that all resolutions of confirmation this day agreed to be forwarded forthwith to the President of the United States."

The record of these proceedings is spread upon the Executive Journal of the Senate of December 20, 1930, at pages 186, 187 and 191* and also appears in the Congressional Record of December 20, 1930, at pages 1260 and 1261.

The vote of the Senate of December 20, 1930, was taken and the order to forward a copy of the resolution forthwith

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* All page references to the Executive Journal of the Third Session of the Seventy-first Congress extending from December 1, 1930, to March 4, 1931, are to the original Executive Journal of the Senate found in the office of the Secretary of the Senate.

to the President was made pursuant to and in accordance with Rules XXXVIII and XXXIX of the Standing Rules relating specifically to proceedings on nominations. These two rules are quoted in full, *supra*, at pages 3-5.

On that same day the Senate, in accordance with a concurrent resolution passed by the two Houses of Congress, adjourned until 12:00 o'clock, noon, Monday, January 5, 1931.

On Monday, December 22, 1930, the Secretary of the Senate as directed by the order of the Senate of December 20, delivered by official messenger to the President of the United States the following communication:

"IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES.

Saturday, December 20, 1930.

RESOLVED, That the Senate advise and consent to the appointment of the following named persons to the offices named agreeably to their respective nominations:

FEDERAL POWER COMMISSION.

George Otis Smith, to be a member for the term expiring June 22, 1935.

Frank R. McNinch, to be a member for the term expiring June 22, 1934.

Marcel Garsaud, to be a member for the term expiring June 22, 1932.

Attest:

(Signed) EDWIN P. THAYER
Secretary."

On the same day the President signed a commission to the appellee, purporting to appoint him a member of the Federal Power Commission and to designate him its Chairman. This Commission was then sent to the Department of State, where the seal of the United States was impressed upon it. There on the same day the commission was delivered to the appellee, who at once took the oath of office prescribed by law and undertook to assume and enter upon the discharge of the

duties of the office of member and Chairman of the Federal Power Commission. The appellee has since assumed to act as member and Chairman of the Commission.

When the Senate reconvened on January 5, 1931, it immediately went into open executive session. Thereupon one Thomas J. Walsh, a Senator from the State of Montana, who on December 20 had voted in the majority upon the question of advising and consenting to the appointment of the appellee, moved that the vote of the Senate taken on that day be reconsidered and accompanied his motion with a motion that the President be requested to return to the Senate the notification which had been transmitted to him. And on the same day the two motions were duly entered. These proceedings were taken pursuant to and in accordance with paragraph 3 of Rule XXXVIII of the Standing Rules of the Senate (*supra*, p. 4).

On January 9, the President *pro tempore*, under an agreement for unanimous consent, put to the vote of the Senate the motion which had been made and was pending for the reconsideration of the vote by which the Senate had advised and consented to the appointment of the appellee. The motion for reconsideration prevailed by the vote of yeas, 44; nays, 37, and not voting, 15. The President *pro tempore* then put to the vote of the Senate the motion, which had also been previously made and was pending, to request the President to return to the Senate the resolution which had been sent to him by the Secretary of the Senate on December 22. This motion prevailed by a similar vote. The record of these proceedings appears in the Executive Journal of the Senate of January 9, 1931, at pages 225 and 227.

On the same day, January 9, the Secretary of the Senate forwarded to the President an authenticated transcript of the resolution requesting the return of the resolution which had been sent to him on December 22, 1930. On the following day the President *pro tempore* laid before the Senate, a message from the President of the United States reading in part as follows:

"I am advised that these appointments [Draper, Garsaud and Smith] were constitutionally made, with the consent of the Senate formally communicated to me, and that the return of the documents by me and reconsideration by the Senate would be ineffective to disturb the appointees in their offices. I can not admit the power in the Senate to encroach upon the Executive functions by removal of a duly appointed executive officer under the guise of reconsideration of his nomination.

I regret that I must refuse to accede to the requests."

On January 10, Senator Thomas J. Walsh made a motion to direct the Executive Clerk of the Senate to place the name and nomination of the appellee on the Executive calendar for the action of the Senate. This motion was agreed to by vote and the President *pro tempore* so ordered. (Executive Journal of January 10, 1931, at pp. 233, 234.) On January 23, the nomination of the appellee was ordered recommitted to the Committee on Interstate Commerce for its consideration. (Executive Journal of January 23, 1931, at p. 306.) On February 3, one James Couzens, a Senator from the State of Michigan, acting on behalf of the Committee on Interstate Commerce, reported to the Senate without any recommendation the nomination of the appellee, which was then ordered to be placed on the Executive calendar for the further action of the Senate. (Executive Journal of February 3, 1931, at p. 351.)

On February 4, the name and nomination of the appellee to be a member of the Federal Power Commission was read by the Executive Clerk. The President *pro tempore* then stated the question as follows:

"Will the Senate advise and consent to the appointment of George Otis Smith to be a member of the Federal Power Commission, for a term expiring June 19, 1935?"

Upon this question 33 Senators voted in the affirmative and 40 Senators in the negative and 23 Senators did not vote. So it was accordingly,

"RESOLVED, That the Senate do not advise and consent to the appointment of George Otis Smith, to be a member of the Federal Power Commission, for a term expiring June 19, 1935."

A record of these proceedings is spread upon the Executive Journal of the Senate of February 4, 1931, at page 366. This vote of the Senate not advising and consenting to the appointment of the appellee was put and taken upon the nomination of the appellee transmitted by the President of the United States to the Senate on December 3, 1930, although the record of the proceedings of the Senate by clerical error states the expiration of the term for which the appellee had been nominated to be June 19, 1935, instead of June 22, 1935, as the fact really is. On February 7, 1931, after two days of actual executive session of the Senate had transpired since the vote not advising and consenting to the appointment of the appellee, the Secretary of the Senate delivered by messenger to the President of the United States a notice of the rejection of the nomination of the appellee.

On these facts the appellant contends that it clearly appears from the record of the proceedings of the Senate that the Senate did not advise and consent to the appointment of the appellee to the office of member of the Federal Power Commission, but on the contrary, that the Senate, by action duly and regularly taken and in accordance with its Standing Rules, refused to advise and consent to his appointment. Despite the issuance of a commission and the taking of the oath of office, the appellee has not been duly and regularly appointed to the office of member of the Federal Power Commission or duly and regularly designated as its Chairman. He has been and is at present unlawfully holding and exercising the office of member and Chairman of the Commission and claiming and assuming to be such member and Chairman.

Summary of Argument.

I. RULES XXXVIII AND XXXIX OF THE STANDING RULES OF THE SENATE BY THEIR EXPLICIT TERMS EMPOWERED THE SENATE TO ENTERTAIN A MOTION, MADE BEFORE THE EXPIRATION OF THE NEXT TWO DAYS OF ACTUAL EXECUTIVE SESSION, TO RECONSIDER ITS VOTE ADVISING AND CONSENTING TO THE APPOINTMENT OF THE APPELLEE, EVEN THOUGH THE PRESIDENT HAD BEEN FORMALLY NOTIFIED OF SUCH CONSENT.

II. IN ADOPTING RULES XXXVIII AND XXXIX THE SENATE DID NOT EXCEED THE POWER VESTED IN IT BY ARTICLE I, SECTION 5 OF THE CONSTITUTION. THE RULES ARE BINDING ON BOTH THE SENATE AND THE EXECUTIVE.

III. THE SIGNING AND DELIVERY OF A COMMISSION AND THE TAKING OF AN OATH BY THE APPELLEE CANNOT FORTIFY HIS POSITION OR SHIELD HIM FROM OUSTER.

The present procedure of the Senate relating to the confirmation or rejection of nominations is governed by Rules XXXVIII and XXXIX of the Standing Rules of the Senate. These rules in plain and unambiguous terms empowered the Senate, at any time prior to the expiration of the next two days of actual executive session, to entertain a motion to reconsider its vote advising and consenting to the appointment of the appellee even though it had previously ordered that a copy of its resolution of consent be forwarded forthwith to the President. The provisions in paragraphs 3 and 4 of Rule XXXVIII permit no other construction. A survey of the historical development of the rules of the Senate relating to reconsideration substantiates this obvious interpretation of the present rules. The existence in the Senate of this power to reconsider after notification is further confirmed by an examination of the multitudinous instances appearing in the Executive Journals of the Senate in which the President at the request of the Senate returned resolutions, both of confirmation and rejection.

The Senate in its proceedings relating to the confirmation of the appellee did not at any time waive its rules. Nor can it be properly asserted that the Senate by ordering on December 20, 1930, that a resolution be forwarded forthwith to the President intended that the President should proceed immediately to commission the appellee or that it intended that its reserved power to reconsider should be truncated by an appointment theretofore made.

The contention that the Senate had no power to reconsider pursuant to its rules unless and until the President, in compliance with the request made by the Senate on January 9, 1931, returned the notification previously sent to him is unfounded in reason or precedent. The initial order of the Senate to notify the President forthwith did not transfer the possession and control of the nomination to the President. Regardless of the whereabouts of the written notification transmitted to the President, the question remains one of the naked power of the Senate to reconsider. If the Senate expressly retained that power by its rules, the President was not justified in refusing its request to return the notification. But in any event his refusal to do so could not emasculate the Senate's power.

To apply the rules as demanded by their plain terms does not render them constitutionally obnoxious. In their enactment the Senate did not exceed the power vested in it by Article I, Section 5 of the Constitution to "determine the rules of its proceedings". The rules do not ignore constitutional restraints or violate fundamental rights. They disclose a reasonable relation to the result sought to be attained by the Senate, namely, a chance to "sleep on" any action taken by it. And neither the advantages or disadvantages nor the wisdom or folly of the rules present any matters for judicial consideration.

The rules were binding upon the Senate and the President and all other persons dealing with the Senate in the premises. Charged with knowledge of their provisions, the signing of a commission by the President prior to the expiration

of the period within which the Senate could entertain a motion to reconsider its vote had no conclusive legal effect. At that time the Senate had not finally given its advice and consent to the appointment of the appellee as required by the Constitution. In fact, while the matter was still *in fieri* the Senate voted not to advise and consent to the appointment of the appellee.

It is clear that the appellee by his own acts in accepting a commission, taking an oath of office and beginning the discharge of the duties of the office did not vest himself with any legal rights. Without a valid confirmation of his appointment by the Senate he is not entitled to act as member and Chairman of the Federal Power Commission. The Supreme Court of the District should therefore have granted the prayer of the appellant's petition and should have ousted and excluded the appellee from the office in question.

POINT I.

Rules XXXVIII and XXXIX of the Standing Rules of the Senate by their explicit terms empowered the Senate to entertain a motion, made before the expiration of the next two days of actual executive session, to reconsider its vote advising and consenting to the appointment of the appellee, even though the President had been formally notified of such consent.

In Section 2 of Article II of the Constitution it is provided that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law". In Section 3 of the same Article, the President is directed to "commission all the officers of the United States".

It appears from Section 2 that three separate and distinct steps are contemplated by the Constitution. In the first place, the President nominates the person proposed to be appointed; secondly, the Senate must advise and consent that the nominee should be so appointed, and lastly, in pursuance of the nomination and the advice and consent of the Senate, the President makes the appointment. *Marbury* v. *Madison,* 1 Cranch 137. See also Opinions of Attorney General of the United States, Vol. 4, pages 217, 219-220 and *Willoughby,* Constitution (2nd ed.), vol. 3, § 987.

The present procedure of the Senate relating to the confirmation or rejection of nominations is governed by Rules XXXVIII and XXXIX of the Standing Rules. See *supra,* at pages 3-5. In brief, Rule XXXVIII provides that the Senate shall consider all nominations in open executive session unless a majority vote shall determine that a particular nomination shall be considered in closed executive session. It is provided that each nomination, unless otherwise ordered, shall be referred to an appropriate committee which in turn shall report its recommendation to the Senate. Thereupon the Senate shall vote as to its advising and consenting to the appointment. After the Senate has voted to advise and consent to an appointment or to reject the nomination, any Senator voting in the majority may move for a reconsideration on the same day on which the vote was taken or on either of the next two days of actual executive session. The Secretary of the Senate is directed not to return to the President nominations which have been confirmed or rejected until the expiration of the time within which a motion to reconsider can be made or while a motion to reconsider is pending, unless otherwise ordered by the Senate. Notification consists of transmitting an authenticated transcript of the Executive Journal of the Senate. See Rule XXXIX. In case the Senate does so order a copy of its resolution to proceed immediately to the President, a motion to reconsider may nevertheless be made but must be accompanied by a motion requesting the President to return such resolution to the Senate.

Believing that the meaning and purpose of the existing rules of the Senate relating to the reconsideration of a vote confirming or rejecting a nomination might be better understood by reviewing their development, we presented in our brief to the Court below an historical survey of such development, dividing it into periods delimited by the days on which the rules were amended. The periods discussed *seriatim* were as follows:

I. February 25, 1790 to March 26, 1806;

II. March 26, 1806 to March 27, 1818;

III. March 27, 1818 to January 3, 1820;

IV. January 3, 1820 to April 6, 1867;

V. April 6, 1867 to March 25, 1868;

VI. March 25, 1868 to January 17, 1877;

VII. January 17, 1877 to date.

The material presented in our survey was substantially incorporated by the Court below in an appendix to its opinion (R. 25-30). The various changes in the rules are also set forth in the compilation, Senate, White House and Departmental Precedents (R. 31).

No attempt accordingly will be made in this brief to review minutely the development of the rules. In passing, however, it is interesting to note the origin of the parliamentary practice of reconsideration. While the first set of rules, consisting of nineteen short and simple rules, adopted on April 16, 1789, by the Senate, pursuant to the power which the Constitution vested in the Senate to "determine the rules of its proceedings" (Article I, Section 5), contain no reference to the reconsideration of a vote previously taken (Annals of Congress, First Congress, Gales (ed. 1834), Vol. I, pp. 20-21), the Senate on February 23, 1790, during the same session, appointed a committee "to prepare and report a rule determining in what cases a reconsideration of a vote of the Sen-

ate shall be admissible". (Annals of Congress, First Congress, op. cit. p. 949.) On February 25, 1790, the Senate adopted the report of this Committee and resolved

> "That, when a question has been once made and carried in the affirmative or negative, it shall be in order for any member of the majority to move for a reconsideration of it." (Annals of Congress, op. cit., p. 950.)

Hence it appears that the Senate's practice of reconsidering an action previously taken dates from the very inception of our Government. While in the Parliament of Great Britain the practice has never existed,* we find it at a quite early date in some of the American colonies.† It seems to be indigenous. While the practice is not mentioned in the rules and orders of the Congress of the Confederation, the record of its proceedings discloses that it was nevertheless frequently resorted to. It was at once applied in the House of Representatives, although a rule on the subject was not adopted until January 7, 1802.‡ As a matter of fact, the term "reconsideration" is found in the Constitution of the United States. There it is provided that if the President shall not approve of a law, he shall return it to the House in which it shall have originated, which shall thereupon proceed to reconsider it. (Article I, Section 7.)

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* Although the practice of reconsideration in a clear cut form has never been applied in the English Parliament, it appears, however, that Parliament has devised other means whereby it does reconsider a vote previously taken by it. (See Jefferson's *Manual of Parliamentary Procedure*, Section XLIII; Henry M. Robert, *Manual of Rules of Order for Deliberative Assemblies*, edition of 1890, p. 66, and Josef Redlich, *Procedure of the House of Commons*, Volume III, pp. 36-37.)

† See the discussion in Robert Luce, Legislative Procedure (1922), at pages 384-385.

‡ See Luther S. Cushing, Law and Practice of Legislative Assemblies (9th ed.), page 505, and Hinds, Precedents of the House of Representatives, Vol. V, § 5605.

THE ORDER OF THE SENATE THAT A RESOLUTION OF CONFIRMATION BE FORWARDED FORTHWITH TO THE PRESIDENT DID NOT PRECLUDE RECONSIDERATION BY THE SENATE WITHIN TWO DAYS OF ACTUAL EXECUTIVE SESSION NEXT SUCCEEDING THE VOTE OF CONFIRMATION.

In the debates of the Senate held on January 5, 6, 7 and 8, 1931, with reference to the reconsideration of the nomination of the appellee, there was considerable discussion as to whether the Secretary of the Senate had in fact been authorized by the Senate to forward immediately to the President a copy of the resolution adopted by the Senate on December 20, 1930, advising and consenting to the appointment of the appellee. It was there argued by some of the Senators that assent by silence to the statement of the President *pro tempore* that, "The Senate advises and consents to the nomination and the President will be notified", did not constitute an order by the Senate that the resolution should be forthwith forwarded to the President. It is not, however, the contention of the appellant in this case that the Secretary of the Senate exceeded his authority in forwarding the resolution to the President on December 22, 1930. The appellant admits that by the usual and established practice of the Senate assent by silence to such a statement by the presiding officer of the Senate constitutes an order. As has been alleged in the petition, the Executive Journal of December 20 shows that with respect to the nomination of the appellee it was ordered by the Senate "that the foregoing resolution of confirmation be forwarded to the President of the United states". Furthermore, the Executive Journal for the same day discloses that at the end of that day's deliberations in executive session it was ordered, "that all resolutions of confirmation this day agreed to be forwarded forthwith to the President of the United States" (R. 3).

But even so, the Senate by the order to transmit immediately to the President the resolution advising and consenting to the appointment of the appellee did not deprive itself of

the power to reconsider the nomination. It is apparent from an examination of paragraph 3 of Rule XXXVIII that the Senate expressly contemplated a situation in which it might reconsider a nomination although notification of its vote had by its direction already proceeded to the President. The plain and simple reading of the provisions in paragraph 3,

> "But if a notification of the confirmation or rejection of a nomination shall have been sent to the President before the expiration of the time within which a motion to reconsider may be made, the motion to reconsider shall be accompanied by a motion to request the President to return such notification to the Senate"—

permits of no other construction. The historical development of this provision substantiates the appellant's position—which may adequately and safely rest upon the naked and explicit provisions of existing Rule XXXVIII.

Although by the rule adopted on March 26, 1806, the Senate could reconsider within the three next days of actual session of the Senate any action previously taken by it, it was definitely provided that,

> "no motion for the reconsideration of any vote shall be in order after a bill, resolution, message, report, amendment, or motion upon which a vote was taken, shall have gone out of the possession of the Senate, *nor after the usual message shall have been sent from the Senate, announcing their decision*" (R. 25-26).

At that time the Standing Rules of the Senate provided that, "The President of the United States be furnished with an authenticated transcript of the executive records of the Senate, from time to time" (R. 25). On March 27, 1818, however, the Senate in executive session adopted a resolution,

> "that in future, all nominations approved, or definitely acted on by the Senate, be by the Secretary returned to the President of the United States *from day to day, as such proceedings may occur,* any rule or usage to the contrary notwithstanding" (R. 26).

It is apparent, therefore, as a result of Rule 21 of the rules of March 26, 1806, and of the resolution adopted by the Senate on March 27, 1818, that the time within which a motion for the reconsideration of a vote advising and consenting to an appointment could be made was indeed very limited. As soon as the Secretary, who was directed to return the nominations approved on the day on which the proceeding took place, returned the nomination to the President, the power to reconsider thereby terminated.

In 1830, when the rules of the Senate were substantially as just stated, a dispute arose in the Senate as to the power of the Senate to reconsider its negative vote on the nomination of Isaac Hill as Second Comptroller of the Treasury, after the resolution announcing the vote of the Senate had been forwarded to the President. At that time the Vice-President submitted the question to the determination of the Senate. The Senate by unanimous vote decided that the motion was not in order "because the President had been notified" (R. 34). Beyond a doubt the provisions of the rules as then existing supported that conclusion.

Yet despite this unanimous decision of the Senate, we find that on April 28, 1842, the Senate requested the President to return the resolution rejecting the nomination of Edmund L. Du Barry sent to him twenty-four days previous (R. 34). On May 3, the President returned the resolution and the Senate subsequently confirmed the nomination (R. 34).

On July 1, 1842, the Senate confirmed Benjamin K. Pierce and Levi Whiting (R. 34), but on July 13 the Senate rescinded its resolution and requested its return. While the Executive Journal contains no record of any action taken by the President pursuant to this request, it does indicate that on July 14 the Senate again confirmed the nominations.

Gradually the practice of reconsideration became more common. In fact, between the time of the decision of the Hill case on April 14, 1930, and the case of A. C. Fisk on March 28, 1867, the Senate requested the President to return resolutions in no less than 160 cases. A few of the requests

as in the Du Barry case followed a rejection of the nomination; the greater portion, however, were made subsequent to a vote of confirmation. And in all of these cases, other than those of John H. Goddard (R. 41) and Westley Frost (R. 46), the President apparently returned the resolution. In a few other cases the President, while returning the resolution, pointed out to the Senate that in the meantime a commission for the appointment had been signed or made out. So it was in the cases of Joseph K. Barnes (R. 39) and H. H. Heath (R. 44-45). Similarly in the Goddard and Frost cases the President informed the Senate that commissions had been issued prior to his receipt of the request of the Senate.

We shall not now discuss the conclusions the appellee draws from some of these precedents to support his contentions. That we do *infra*, at pages 49-51. But at this point we do stress that during the years between the Hill and the Fisk decisions the Senate rules definitely provided that the Senate had no power to reconsider once the notification had gone forward to the President. What happened is quite apparent. The Senate found in actual practice that it frequently desired to reconsider its vote of confirmation or rejection after the notification thereof had been sent to the President. It will be recalled that by the resolution adopted by the Senate on March 27, 1818, it was provided that the Secretary should return to the President from day to day as the proceedings occurred all nominations approved or definitely acted on by the Senate (R. 26, 33). In order to effectuate its desire the Senate adopted the practice of requesting the President to withhold the issue of a commission and return the nomination to it. The President, similarly acting outside the legal bounds imposed by the rules of the Senate, returned the resolutions. In effect, the President was voluntarily resubmitting the nomination, thereby permitting the Senate to act on it. In law it was as if the President had withdrawn a nomination prior to final action thereon by the Senate and later resubmitted the same nomination. If a commission in the meantime had been issued the President would

naturally so inform the Senate. Since the Senate retained unto itself no power under its rules to reconsider a nomination once notification had been sent to the President, let alone once a commission had been issued, it usually would not proceed to vote on the reconsideration. In short, it was an era of comity.

In the case of Joseph K. Barnes (R. 39), for instance, the Executive Journal records that the motion to reconsider was withdrawn (R. 40). In other cases, as in the nominations of John H. Goddard (R. 41) and H. H. Heath (R. 44-45), the Senate merely dropped the matter without further proceedings. It appears, however, from the record in the Journal that on at least two occasions, some Senators, perhaps overanxious to achieve reconsideration, apparently forgot the unequivocal provision in the Senate rule that its action became final once a notification had been sent to the President.

Thus, on February 23, 1867, during the administration of President Johnson, Westley Frost was confirmed (R. 46). On February 27 the Senate requested a return of its resolution. On March 2 the President transmitted to the Senate a report from the Secretary of the Treasury stating that Frost, on the day before the Senate requested return of the resolution, had qualified for his office and had received his commission with instructions to enter upon his duties at once. On April 1, nearly a month later, Senator Sherman submitted a resolution providing that the Secretary of the Treasury be requested to recall the commission issued to Frost because his confirmation was recalled before he received his commission or was sworn into office and that the President be requested to return to the Senate the notification which had been sent to him. This resolution was rejected. In other words, the Senate in its vote followed its unanimous ruling in the Hill case.

On April 3, 1867, two days after the Senate rejected the resolution presented by Senator Sherman, it had another opportunity to determine what power to reconsider it had retained under its rules. On March 28, 1867, the Senate

confirmed A. C. Fisk (R. 48). On March 30 the Senate requested a return of the resolution. The session of the Senate then terminated on March 31. On April 2 the President returned the resolution. On the next day Senator Henderson moved the Senate to proceed to consider the motion made by him on March 30 to reconsider its vote advising and consenting to the appointment of Fisk. According to the record of the Executive Journal, Senator Conkling thereupon raised a question of order. He contended that the motion to reconsider was to be deemed as having been made for the first time on April 3 because it was not in order to make the motion nor to enter it on March 30 since the nomination had passed out of the possession of the Senate. In other words, his argument was based on the decisions in the Hill case and in the Frost case, to wit: that a nomination could not be reconsidered after notification had been sent to the President. The President *pro tempore* held the point of order well taken. Senator Fessenden appealed to the Senate. The Senate upheld the decision of the Chair (R. 49).

No doubt it was as a result of these incidents that three days later on April 6, 1867, upon the motion of Senator Fessenden, the Senate made a decisive change in its standing rules governing the reconsideration of action previously taken. The change was fundamental, we repeat, although the appellee in his brief in the Court below (p. 21) states, "Changes since 1790 are really matters of detail".

By the action then taken the existing limitation upon the power of reconsideration, namely, that a vote could not be reconsidered after a bill, resolution, message, report, amendment, or motion had gone out of the possession of the Senate announcing its decision, was trimmed down by the insertion of an amendatory clause, reading, "*except a resolution confirming or rejecting a nomination by the President*". It would appear that the Court below attached little importance to what we consider a pivotal change in the rule, for in its opinion it states (R. 20):

> "The only two significant changes in the provisions of the present rules not contained in the earlier are, first, the right of the Senate to defer notification for two days and, second, the provision for a motion to request the President to return the notification."

The latter of these provisions, added at the end of the rule, read:

> "but a motion to reconsider a vote upon a nomination shall always, if the resolution announcing the decision of the Senate has been sent to the President, be accompanied by a motion requesting the President to return the same to the Senate."

On the same day, April 6, 1867, the Senate, again upon the motion of Senator Fessenden, also amended its rule relating to the return of nominations to the President. Whereas the resolution adopted on March 27, 1818, directed the Secretary to return all nominations approved "from day to day, as such proceedings may occur", the rule thereafter provided that the return should be made "on the next day after such action is had, unless otherwise ordered by the Senate" (R. 27). These changes made in the rules on April 6, 1867, read in the light of the previous rules and of the decision of the Senate in the Hill, Frost and Fisk cases, clearly evidence an intention by the Senate not to foreclose itself from the reconsideration of a nomination by the mere transmission of a resolution to the President. The purpose of the Senate is further substantiated by an examination of Rule 20 of the rules adopted on March 25, 1868 (R. 27), and Rule 74 of the rules adopted on January 17, 1877 (R. 29).

There is another provision in Rule XXXVIII which, we believe, inescapably leads to the conclusion that by its rules the Senate did not intend that its power of reconsideration should be ended by merely ordering a copy of a resolution of its vote to be forwarded to the President. By paragraph 4 of Rule XXXVIII, the Secretary is directed not to return a nomination to the President while a motion to reconsider is

pending, unless he is otherwise ordered by the Senate. In other words, if the Senate voted to advise and consent to a certain appointment, and on the same day a motion to reconsider was made, the Secretary would not transmit to the President a copy of the resolution even after the expiration of the next two days of actual executive session. Unless he were otherwise ordered by the Senate, the notification would be delayed until the motion of reconsideration had been acted upon by the Senate. Assuming, however, that while the motion to reconsider was pending, the Senate ordered the Secretary to transmit a copy of the resolution to the President, it would obviously do violence to the rule to urge that the power of the Senate to take action on the pending motion of reconsideration had thereby been lost. This would be to make a vote ordering the transmittal of the resolution identical in parliamentary effect with a negative vote on the motion to reconsider. Why should the Senate adopt this circuitous procedure calculated to kill the pending motion by indirection, when the desired result could be directly accomplished by a vote on the main question?

If additional support were necessary to establish conclusively that the Senate did not intend by its rules to preclude itself from the reconsideration of the nomination of the appellee by ordering the resolution of its vote of confirmation to be transmitted forthwith to the President, reference need only be made to the multitudinous instances appearing in the Executive Journal of the Senate since April 6, 1867, in which the Senate requested of the President the return of a resolution, either of confirmation or rejection, and in which the President did in fact return such resolution. These cases appear in the compilation of Senate, White House and Departmental Precedents (R. 31). A few of the cases relate to the reconsideration of a nomination previously rejected by the Senate, but by far the vast majority of them involve the reconsideration of previous votes advising and consenting to an appointment. Moreover, in the latter case it often appears from the record in the Executive Journal that nominations previously

confirmed were, as in the case now before this Court, subsequently rejected.

During the debates in the Senate with respect to its power to reconsider its vote advising and consenting to the appointment of this appellee, it was urged by some Senators that, although it was generally true that the Standing Rules permitted reconsideration within the next two days of actual executive session despite the fact that a resolution had gone forward to the President, the Senate had in the case at bar waived its rules. There can be no question that the Senate by unanimous consent has the power at any time to suspend its rules. It is so provided by Rule XL of the Standing Rules of the Senate.* However, we submit that the record of the proceedings of the Senate in the instant case forbids such a contention.

The Senate Executive Journal of December 20, 1930, shows that after the result of the vote of the Senate advising and consenting to the appointment of the appellee was announced, the President *pro tempore* stated:

> "The Senate advises and consents to the nomination and the President will be notified."

The record shows no further proceedings taken on this vote. The Secretary of the Senate, in the usual course, merely entered upon the Executive Journal the order, "that the foregoing resolution of confirmation be forwarded to the President of the United States". The record of the proceedings of the executive session of the Senate of December 20, 1930, also contains at the end thereof a general catch-all order to the effect, "that all resolutions of confirmation this day agreed to be forwarded forthwith to the President of the United

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* "No motion to suspend, modify, or amend any rule, or any part thereof, shall be in order, except on one day's notice in writing, specifying precisely the rule or part proposed to be suspended, modified or amended, and the purpose thereof. Any rule may be suspended without notice by the unanimous consent of the Senate, except as otherwise provided in clause 1, Rule XII."

States". It is indeed difficult to find any support in this naked record for the assertion that the Senate had waived its right to reconsider under Rule XXXVIII, Unanimous consent for the suspension of the rule can only be found, if at all, in the silent assent of the Senate to the statement of the President *pro tempore* that the President of the United States would be notified. But it is apparent that this related solely to the transmittal of the resolution to the President and in no way to the suspension of any of the provisions of Standing Rule XXXVIII. The practice of the Senate in this respect is too well settled to permit serious dispute.

THE NOTIFICATION OF THE PRESIDENT WAS NOT TANTAMOUNT TO A WARRANT TO PROCEED FORTHWITH TO ISSUE A COMMISSION, THE OPINION OF THE ATTORNEY GENERAL TO THE CONTRARY NOTWITHSTANDING.

The Attorney General in his opinion of January 10, 1931 (36 Ops. A. G. 382), advising the President of the United States as to the return of the resolution requested by the Senate on January 9, 1931, admitted that the Senate under its rules had the power to reconsider within the next two days of actual executive session its vote advising and consenting to an appointment; but then he proceeded to limit, under the guise of construction, the power which is explicitly retained by the Senate in Rule XXXVIII. His reasoning advances by the following steps: First, the transmittal of the resolution to the President could have had no conceivable purpose other than direction by the Senate to the President to proceed immediately to issue a commission; second, the President was justified in relying upon the resolution forwarded to him; and, lastly, once the President had made the appointment, the Senate no longer had the power to reconsider its vote.

The appellee in his brief in the Court below partially adopted this conception of the Attorney General. As stated in the opinion of that Court (R. 17):

"It is contended by the respondent that—

THIRD. The President upon receiving that notification was wholly justified in assuming that it was a notification sent to him to the end that he might act; that he was well within his constitutional authority when he did act and signed the commission of the respondent."

In passing, it may be noted, however, that neither the appellee in his brief or in the oral argument, nor the Court below in its opinion laid much stress upon the reasoning presented by the Attorney General. Other grounds were apparently considered by both to be of greater force. These, we examine, *infra,* at page 39 *et seq.*

The first step in the reasoning of the Attorney General is set out in his opinion of January 10, 1931, as follows:

"* * * but where the Senate orders a notification to be sent and without waiting for the expiration of the reconsideration period, some purpose must be attributed to that action. Why order immediate notification to be sent to the President unless he is expected to act upon it? The only conceivable purpose in expediting the notice is to make it possible for the President to expedite the appointment. If ordering the notification of confirmation to be sent to the President in advance of the expiration of the time allowed by the rules for reconsideration is not intended as a formal announcement and expression of the Senate's consent to an immediate appointment, the advance notification would have no purpose whatever."

The historical development of the provisions of Rule XXXVIII furnishes the answer to this contention.

In the first place, it should be constantly borne in mind that the practice of the Senate, from the beginning of our Government to June 18, 1929, has been to transact all executive business in closed session. It was only on June 18, 1929, that Rule XXXVIII of the Standing Rules of the Senate was amended so that all business should thereafter be transacted in open session unless the Senate in closed session by

a majority vote determined that a particular nomination should be considered in closed executive session (R. 30).

Prior to April 6, 1867, the rules were simpler in that, irrespective of the limited period during which the Senate could reconsider, its power to do so was *ipso facto* lost once the resolution had gone out of its possession announcing its decision. In other words, the transmittal of the resolution was made the controlling factor. As to this the Court below agreed with the appellant (R. 21). But by the amendments of 1867, the situation was completely reversed. The period within which and the conditions under which a motion to reconsider could be made were now determined solely by the expiration of the next two days of actual session. By Rule 20 of April 6, 1867 (R. 27), the time of sending a resolution to the President became subsidiary in importance and in fact immaterial in so far as its relation and effect upon the power to reconsider was concerned. The Secretary of the Senate was directed by the rules to return the nominations on the next day after the action was taken. Certainly it will not be contended that his routine transmittal on the succeeding day of the resolution of confirmation could have any effect upon the express power to reconsider. For it is clear from the rules that this did not prevent reconsideration during the second day of actual session. In other words, the power to reconsider was rendered distinct and independent of any practice of transmitting to the President a copy of a resolution.* In addition, however, it was provided by the rule that the Senate could otherwise order as to the transmittal of the resolution. Presumably it could order not to forward the notification until after the expiration of

* The divorce of the right to reconsider from the transmittal of a resolution, bill or amendment is not unusual. It also appears in the second paragraph of Rule XIII of the Standing Rules of the Senate, reading:

> "When a bill, resolution, report, amendment, order, or message upon which a vote has been taken, shall have gone out of the possession of the Senate and been communicated to the House of Representatives, the motion to reconsider shall be accompanied by a motion to request the House to return the same; which last motion shall be acted upon immediately, and without debate, and if deter-

the period within which the Senate could reconsider. Again, this would have no effect upon the power to reconsider. Nor would the Senate have so intended it. On the other hand, the Senate might have ordered its resolution sent before the next day after the action taken. Similarly it could not be said that the Senate must have intended by this to cut short its power to reconsider.

Hence under Rule 20 of April 6, 1867 there were three possible times at which a report of the action of the Senate may have been sent to the President:

1. Immediately after the vote was taken (by order of the Senate).

2. On the next day after the vote was taken (transmitted by the Secretary in regular course).

3. At the expiration of two days of actual session after the vote was taken or at any time thereafter (by order of the Senate).

Neither of these times need have coincided with the expiration of the period within which it was provided by the rule that the Senate could reconsider. The transmittal of the resolution was no longer of consequence in its effect upon the power to reconsider. The power to reconsider had now become independent of the transmittal of the notification. This independence is emphasized by the fact that although a motion to reconsider may have been made soon after taking a vote and was still pending, the Secretary in the regular course of his duties would nevertheless have transmitted to the President under the rules a copy of the resolution on the next day after the vote.

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mined in the negative shall be a final disposition of the motion to reconsider."

In the House of Representatives it is well established that a motion to reconsider may be entertained although the bill or resolution to which it applies may have gone to the other House or to the President. (Hinds, Precedents of the House of Representatives, Vol. V, §§ 5666-5668.) It has there been held that a motion to reconsider a vote was not prevented by the fact that the House had informed the Senate that it had agreed to a Senate amendment to a House bill. (Hinds, *ibid.*, § 5672.)

Rule 43, adopted on March 25, 1868, provided that the Secretary of the Senate should not return to the President nominations approved or definitely acted upon "until the expiration of the time limited for making a motion to reconsider the same, or while a motion to reconsider is pending, unless otherwise ordered by the Senate" (R. 28). This provision was retained in Rule 75 adopted on January 17, 1877 (R. 29), and is found in paragraph 4 of Rule XXXVIII. Although there exist neither committee reports nor any discussion in the Senate definitely stating the purpose of the changes made in Rule 43, it would appear that the Senate thereby intended that in the case of most nominations no resolution should go to the President until the expiration of the period within which reconsideration could be had. Yet the Senate realized that since it passed upon nominations in closed sessions, the President would have no official notice of the attitude of the Senate prior to the receipt of a resolution. It would seem, therefore, that the Senate sought to preserve in its rules the possibility of notifying the President of its attitude on a nomination before it took final action on a nomination. For instance, the receipt of such a resolution would have permitted the President to muster support for a nominee. Thereby a nominee rejected on a first vote might upon reconsideration be confirmed. Or it might have permitted the President to withdraw the nomination before the final rejection. Incidentally, the public would have no knowledge of any of the action taken by the Senate.

For a good many years after March 25, 1868, the date of the adoption of Rule 43, the Senate but rarely ordered the resolution of its vote to be forwarded to the President prior to the expiration of the reconsideration period (See R. 56, *et seq.*). Later on it appears from the Executive Journal that it became more and more a matter of custom to order the immediate notification of the President. Moreover, this development would appear most natural. Why not let the President know our attitude? Thus would the Senate reason. In fact, we are informed by the Executive Clerk of the Office of the Secretary of the Senate that during the past

ten years the practice has been to forward a resolution to the President forthwith in nearly every case. And in that period the Senate has undoubtedly passed upon thousands of nominations. But to measure the probable intent of the Senate one need only examine the cases in which the Senate reconsidered its action, arising since January 11, 1884, when the rules governing reconsideration took on their present form (R. 85). Ninety-two such cases are listed in the Precedents (R. 86-110). In seventy-four of these the Executive Journal specifically records that the Senate had ordered after the original vote that the President be notified forthwith of its action. Of the eighteen cases where this is not recorded, nine occurred as long ago as January 16, 1884 (R. 86).

In the brief filed by the Attorney General and Solicitor General as *amici curiae* in the Court below, it is stated:

> "It has been the executive practice to act forthwith on such notifications" (Br. 4).

If by acting is meant the issue of a commission, it would follow as a consequence that it has also been the practice of the President to return notifications to the Senate for its reconsideration despite the action so taken by him because since April 6, 1867, it has been the practice in all cases but two (J. C. S. Colby (R. 69) and Morris Marks (R. 74)) to return the notification when requested, and in numerous cases it appears the request for the return of the notification reached the President a good many days after the notification had been received.

Under such circumstances the argument that the Senate definitely intended that the President should act immediately loses all force. Moreover, the result of such an interpretation, if interpretation it may be called, would transform the present rules of the Senate into the rules as they existed between March 27, 1818, and April 6, 1867, when the Secretary was directed to return the nominations to the President from day to day as such proceedings occurred,

thereby foreclosing reconsideration by the Senate. And it might also be asked whether it would be similarly contended in the case of a vote not advising and consenting to the appointment of a person that the immediate forwarding of the notification should be taken by the President as a final expression by the Senate of its wish that he should at once submit to it another name, thereby preventing the Senate from reconsidering and subsequently confirming the first nomination. On what theory can it be argued that notification to the President has one significance in the case of confirmation and another in the case of rejection?

Granted that there may be unusual situations in which the Senate would desire the President to expedite the appointment as much as possible—situations in which it might consider the postponement of the appointment until the expiration of two days of executive session as unnecessary, because, in the first place, reconsideration would be unlikely, and, secondly, because the particular office demanded immediate occupancy—to meet such special cases the rules offer a special procedure. A Senator need only make a motion to reconsider and have it tabled, and the matter is then finally concluded and the Senate is *functus officio*. See paragraph 3 of Rule XXXVIII.* The President is free thereupon to

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* Rule XIII of the Standing Rules of the Senate relating to the power to reconsider all other action within the next two days of actual session after the action, contains a similar provision. It reads as follows:

> "Every motion to reconsider shall be decided by a majority vote, and may be laid on the table without affecting the question in reference to which the same is made, which shall be a final disposition of the motion."

The practice of making a motion to reconsider and tabling it is especially current in the House of Representatives. While it is there in order to move to reconsider a vote on a motion to lay on the table whether the decision be in the affirmative or in the negative, it is settled practice that a motion to reconsider may not be applied to a vote whereby the House has laid another motion to reconsider on the table. See Hinds, Precedents of the House of Representatives, Vol. V, §§ 5632-5640, and Robert Luce, Legislative Procedure (1922), page 302.

In this connection compare the provision in Rule 20 of March 26, 1868, that no motion to reconsider a vote upon a motion to reconsider shall be in order at any time (R. 27-28).

make an immediate appointment. This definite provision by the Senate of a method to meet such extraordinary cases and bring consideration to an end, excludes, we believe, any serious attempt to construe the customary procedure of ordering a transmittal of the notification before the expiration of two days of executive session as indicating an intention on the part of the Senate that the President should make an immediate appointment. Aside from all of this, the record of the proceedings of the Senate do not contain even a hint by any Senator that the appointment of this appellee should be made immediately. The Senate, in fact, knew that the Federal Power Commission as then constituted was actually operating and would continue to do so until the new commission was duly organized (46 Stat. 797).

THE PRESIDENT WAS CHARGEABLE WITH KNOWLEDGE THAT THE SENATE RETAINED ITS RIGHT TO RECONSIDER.

The second link in the reasoning of the Attorney General is that the President was justified in relying upon the resolution forwarded to him and in proceeding to the immediate issuance of the appellee's commission. We submit, however, that the President was not only not so justified, but was charged in law with knowledge that any appointment made by him on December 22, 1930, the same day on which he received a copy of the resolution of approval, was subject to be aborted by the further action of the Senate.

The President knew that the vote of the Senate advising and consenting to the appointment of the appellee was taken on December 20. This appears on the face of the resolution delivered to him by the Secretary of the Senate. See paragraph 6 of the petition (R. 3). He also knew that the Senate had recessed on the same day until January 5, 1931. Moreover, he must have known, or at any rate is legally charged with knowledge of the rules of the Senate, and these rules on their face in unequivocal terms permitted the reconsideration of a vote by the Senate within the next two days of actual executive session.

The President must also have known that his predecessors in office had often been called upon to return resolutions transmitted to them by the Senate in order to permit the Senate to reconsider its vote, and that they did return such resolutions. In fact, the Executive Journal discloses that the Senate on two occasions prior to the case before this Court requested President Hoover himself to return resolutions advising and consenting to an appointment, and that the President did so return them. These resolutions had been forwarded to him forthwith and prior to the expiration of the reconsideration period. See compilation of Senate, White House and Departmental Precedents (R. 109-110). As a matter of fact, the Attorney General in his opinion of January 10, 1931, made no pretense of contending that the President was not apprised of all these facts. Yet the President on December 22 presumably signed a commission to the appellee and sent it to the Department of State, where the seal of the United States was impressed upon it and on the same day it was delivered to the appellee upon his taking the oath of office, for we are informed by officials in the appointment office of the Department of State and in other departments that the President never signs a commission in blank.*

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* In U. S. C., Title 4, Section 5, it is provided:

> "The Secretary of State shall have the custody and charge of such seal, and shall make out and record, and shall affix the same to, all civil commissions for officers of the United States, to be appointed by the President, by and with the advice and consent of the Senate, or by the President alone. But the seal shall not be affixed to any commission before the same has been signed by the President of the United States, nor to any other instrument, without the special warrant of the President therefor."

With respect to commissions prepared by other Secretaries it is likewise provided that the seal shall not be affixed to any commission before it shall have been signed by the President. (See U. S. C., Title 5, §§ 11 and 12.)

THE POWER OF RECONSIDERATION IS NOT LOST SIMPLY BECAUSE THE PRESIDENT HAS ACTED BEFORE THE REQUEST FOR THE RETURN OF THE NOTIFICATION IS RECEIVED.

The third step in the Attorney General's reasoning is really a begging of the question. On the one hand, the Attorney General admits that the Senate is entitled to request the return of a notification and to reconsider its vote if the President has not yet acted thereon; but if the President has acted prior to the receipt of the request, the Senate is thereby rendered impotent. Here is the kernel of the opinion of the Attorney General in his own words:

> "that the request for the return of the notification will be too late if it fails to reach the President before the appointment is made. Senate practice lends weight to these conclusions."

We shall undertake to show that Senate practice does not support this view and that the Attorney General's statement to the contrary is an inadvertence. But we submit also that Rule XXXVIII itself forbids this conclusion. The contention transgresses the bounds of legal construction. It is elementary that where the provisions are plain and unambiguous, construction or interpretation is not called into play.

> *Lewis* v. *United States,* 92 U. S. 618, 621;
> *United States* v. *Rollins,* 130 U. S. 662, 670;
> *Yerke* v. *United States,* 173 U. S. 439, 442;
> *United States* v. *Ewing,* 184 U. S. 140, 149-150;
> *Comm. of Immigration* v. *Gottlieb,* 265 U. S. 310, 313.

To adopt the interpretation of the Attorney General would mean the bodily incorporation into paragraph 3 of Rule XXXVIII, after the words, "when a nomination is confirmed or rejected, any Senator voting in the majority may move for a reconsideration on the same day on which the vote was

taken, or on either of the next two days of actual executive session of the Senate", of the words "unless the President has been notified and has made the appointment". This incorporation, in its physical form, immediately renders the remaining provisions of the rule meaningless and inconsistent. One portion of the rule should not be construed to annul or destroy what has been clearly provided by another. If the rule were to be so interpreted, it is obvious that the Senate, while a motion to reconsider a nomination was pending, would in no case order a notification to be sent to the President, knowing that if the President hurriedly made the appointment it could take no further action upon the pending motion. But paragraph 4 of Rule XXXVIII definitely provides that a notification may be ordered by the Senate to be transmitted to the President although at the time a motion to reconsider is pending. If the Senate desired in such a case to make its vote final—that is by destroying the possibility of reconsideration—the natural and ordinary method of doing so would be to make a motion to table the motion to reconsider. This is explicitly provided in paragraph 3 of Rule XXXVIII.

Nor can it be argued that in the more usual case where a motion to reconsider has not as yet been made, the Senate intended to rest the finality of its action upon events beyond its own control. It is most unlikely that the Senate, which by its rules formulated the practice of reconsideration in order the better to reach a sound judgment in the confirmation of nominations submitted to it, should want to stake the loss of this valuable power upon the haste or procrastination of the President. And this is particularly so when we consider that the fundamental changes made in the rules of April 6, 1867, occurred at a time when relations between President Andrew Johnson and the Senate were exceedingly strained.

A consideration, moreover, of the practical administration of the interpretation sponsored by the Attorney General discloses that it is purely a *tour de force*. The conclusion reached by him seems to suggest that the process resolves

itself into a mere race of diligence upon the part of the President and Senate in case of a conflict of opinion—or a possible conflict of opinion between them. So long as the President is not in receipt of the Senate's request for a return of its notification, his hands are free, we are told, and any action he may take is final and irrevocable. It can make no difference, if this is the law, that a messenger is actually on his way with a request; or that the Senate has in fact voted to reconsider before the commission is signed; or even that on such reconsideration the nomination has been rejected. Indeed by the same reasoning the President, having once been notified, might wilfully hasten the appointment notwithstanding actual knowledge on his part from unofficial sources that the Senate had proceeded or was proceeding to reconsider and reverse its action. Could it be pretended that an appointment made under such circumstances was based on that advice and consent of the Senate which the Constitution contemplates?

The debates in the Senate and the very reconsideration of the nomination of the appellee disclose that the Senate believed that its power to reconsider was not destroyed by the immediate issue of a commission. In the construction of a parliamentary rule, the courts will respect the meaning which the legislative body by its action has placed upon it.

State v. *Savings Bank of New London,* 79 Conn. 141, 152; 64 Atl. 5, 9 (1906);

Witherspoon v. *State ex rel. West,* 138 Miss. 310, 326, 103 So. 134, 138 (1925);

State ex rel. Whitney v. *Buskirk,* 40 N. J. L. 463, 467 (1878);

French v. *Senate and State of California,* 146 Calif. 604, 608, 80 Pac. 1031, 1033 (1905);

Davies v. *City of Saginaw,* 87 Mich. 439, 444, 49 N. W. 667, 668 (1891);

State ex rel. West v. *Butler,* 70 Fla. 102, 120; 69 So. 771, 776 (1915);

Smith v. *Jennings*, 67 S. C. 324, 328; 45 S. E. 821, 822-23;
People ex rel. Locke v. *Common Council of the City of Rochester*, 5 Lans. (N. Y.) 11, 14-15 (1871).

As a conclusive test of the soundness of the theory of the Attorney General, it may be asked: If the notification sent the President contained an express statement that, the premises to the contrary notwithstanding, the Senate reserved the right at any time within the two succeeding days of executive session to reconsider its action, could the President foreclose the Senate from pursuing that course by the immediate issue of a commission? Yet just this qualification is attached by necessary implication to every notification sent under the current rules.

THE SENATE'S POWER TO RECONSIDER IS NOT CHECKMATED BY THE REFUSAL OF THE PRESIDENT TO RETURN THE NOTIFICATION REQUESTED BY THE SENATE.

Diverging somewhat from the reasoning of the Attorney General, the Court below struck out upon a different line. It adopted as the test of continuing power by the Senate, its "*possesion* of the subject matter" or its "*control* of the matter". Alongside phrases such as "control of the matter", "surrenders control over the transaction" and "restored control" appear the citation of the parliamentary rule stated in Jefferson's Manual (R. 19) and a discussion of the Senate rule governing the reconsideration of a bill (R. 23). And in speaking of present Standing Rule XXXVIII, the Court states:

> "The principle of possession as necessary to effective reconsideration is still recognized by the provision for a request for return of notification. The time within which the Senate must make up its mind whether or not to treat a vote of confirmation as final is still two days of actual executive session. The right within that time to part with possession by notification to the President

> is still preserved. In short, the Senate rule in its present form indicates no departure whatever from the theory which inspired the very earliest rule—namely, that parliamentary reconsideration is impossible unless the subject-matter is still within the Senate's possession" (R. 23).

This comes dangerously near if indeed it does not achieve a begging of the entire question. Nor can it be stated with certainty whether the theory adopted by the Court below is bottomed upon the fact (1) that the Senate had lost physical possession of some indispensable document or (2) that while the Senate in advising on a nomination does not act on a physical substratum the Senate by its action here had lost control of the transaction—there had been a transit of control from the legislative to the executive branch.

In support of the first hypothesis, the Court adduces Section XLIII, second paragraph, of Jefferson's Manual to the effect that,

> "If, after a vote, the *paper* on which it is passed has been parted with, there can be no reconsideration; as if a vote has been for the passage of a bill, and the bill has been sent to the other House" (R. 19).

From this the Court reasons that the Senate's power to act is born upon its obtaining possession of a certain physical substratum and dies upon its relinquishing possession thereof. Yet it is clear that the parliamentary rule of Jefferson was formulated for the process of legislation. The rule speaks of "the paper on which it is passed has been parted with". But in the process of advising and consenting to a nomination what is "the paper", it may be asked.

The President starts the process in operation by sending a letter of nomination to the Senate. If the letter of nomination is "the paper", the legislative rule of Jefferson is immediately rendered inapplicable, for the President can deprive the Senate of any power to act thereon by merely sending a letter similar to the original letter of nomination informing

the Senate that he withdraws the nomination—the original letter of nomination remaining at all times in the custody and possession of the Senate. This is admitted by the Court below (R. 22). In Standing Rule XXXIX, it is provided "that no paper, except original treaties transmitted to the Senate by the President of the United States, and finally acted upon by the Senate, shall be delivered from the office of the Secretary without an order of the Senate for that purpose" (R. 16).

Furthermore, when paragraphs 5 and 6 of Standing Rule XXXVIII come into operation, the Senate loses all power to act on a nomination. Still the original letter of nomination remains in the custody and possession of the Senate. Hence, without doubt "the paper" cannot be the letter of nomination.

It would not be contended by the appellee that though "the paper" is first the letter of nomination, once the Senate votes on a nomination, "the paper" becomes the resolution adopted. For the resolution does not exist in a physical form. But it might be contended by him that "the paper" has now become the certificate of the Secretary notifying the President of the vote of the Senate on a nomination. In his oral argument in the Court below, the appellee referred to this notification as the "reciprocal" of the letter of nomination. In other words, it may be that he will now contend that there has been the substitution of one paper for another. However, this very contention, we submit, would preclude the applicability of the parliamentary rule of Jefferson. In addition, it is clear that what is sent to the President is merely a notification of the action of the Senate. As a paper, the notification is not a requisite. If the Senate has finally confirmed a nomination, the President may or may not proceed to appoint apart from the notification. In the process of legislation, the Constitution in Section 7 of Article I emphasizes the function that the physical possession of a bill plays. The bill is presented to the President; if he approves it, he shall sign it, but if not, he shall return it, and so forth.

But in making an appointment the President does not act upon the notification as a paper.

And when a notification is returned to the Senate, is "the paper" upon which action is taken the notification or the original letter of nomination? In its opinion the Court assumes that the indispensable physical substratum is the notification. Certain it is, however, that the Senate in its vote of reconsideration does not act upon the notification. Might it be contended that there has still been another substitution?

Admitting *arguendo* the implication of the Court below that the notification which the Secretary sent to the President is "the paper", it, of course, would follow that since the notification was never returned, the Senate had no power either to make and enter a motion to reconsider on January 5, 1931, or to vote upon that motion on January 9, 1931 (R. 5). But it will be granted, we presume, that it is the practice of the Senate to make and enter a motion to reconsider while the notification is outstanding. In so doing the Senate does act. What has the action been taken upon? Not the unreturned notification; not the letter of nomination, if one adopts the theory that after a vote the paper becomes the notification; and finally not the resolution recorded in the Executive Journal.

This analysis of the process of advising and consenting to a nomination shows the utter impossibility of applying to the case before this Court parliamentary rules formulated either by Jefferson or by the Senate to govern the process of legislation. The process of advising and consenting is not legislative. It may be termed quasi-executive; in fact, it is *sui generis*.

Now, turning to the Court's theory of "transit of control" which, in contradistinction to the one just discussed, may be called the intangible theory, it becomes of no direct consequence where and in whose possession the letter of nomination or the notification might be. This theory, in our opinion, is the only one which fits the process. Yet in substance it is no different from the reasoning presented by us in the

Court below and reasserted in this Court. Whether the Senate has "control of the transaction" when the notification is in the hands of the President is reduced in its ultimate analysis to this: Did or did not the Senate retain under its rules power to reconsider even though it had ordered that the President be notified forthwith of its vote? This crucial question the Court below answered negatively. In its opinion it stated,

> "Constitutional theory, parliamentary usage, Senate rules, Senate precedents, and considerations of practical procedure alike lead to the conclusion in the instant case that when the Senate, in conformity with its own rules, unanimously ordered notice of consent to be sent to the President, it once for all surrendered its control of the matter and its right to reconsideration and left the Executive free to make a constitutional appointment" (R. 25).

According to the view taken by the Court below the Senate has no power to reconsider, whether the President receives the request for the return of the notification before or after he has issued a commission. And, moreover, even if the request were received previous to the appointment, the President would be under no legal compulsion to return the notification. But out of mere comity, just as had been the practice before April 6, 1867, the President in such a case might return the notification. On the other hand,

> "After an appointment is made by the President upon notification by the Senate of its confirmation of a nominee, the President is without authority to restore control to the Senate by a return of the resolution of notification" (R. 24).

Hence, to the Court the legal power of the Senate under its present rules is no greater than it was previous to April 6, 1867. In fact, it made bold to state that "Changes since 1790 are really matters of detail" (R. 23-24).

The Court predicates its construction in part upon the fact that,

> "There is no provision in the rule that if the request to restore possession is not complied with, the Senate may nevertheless vote a reconsideration. Nor is there any provision of the rule that such course may be taken by the Senate if, after notification, the President 'has actually appointed and his reply to the Senate so states" (R. 21).

We submit that little comfort indeed can be found in these omissions in Rule XXXVIII. Surely the Senate, intending to retain the right to reconsider despite its ordering a notification to be transmitted forthwith to the President, would not presumptuously incorporate in its rules provisions guarding against an anticipated refusal of the President to return the resolution or his disregard of the reserved power of the Senate by issuing a commission.

As a matter of fact, the power of the Senate to proceed with reconsideration in the absence of the return of the notification is not now an open question. The Senate does make and enter motions to reconsider while a notification is outstanding. The Senate's reconsideration has begun. The right of the Senate to make and enter a motion to reconsider while a notification is in the hands of the President was the issue in dispute in the Fisk case (R. 48). There Senator Conkling argued that "it was not in order to make the motion nor to enter it on March 30", and the Senate upheld him. However, when the rules were changed on April 6, 1867 (R. 27), they expressly provided for the initiation of reconsideration prior to the return of the resolution by the President. In Rule 20 it is stated that it shall be in order for any member of the majority to *move* for the reconsideration of a question but that no motion for the reconsideration shall be *in order* after a bill, resolution, message, etc., upon which the vote was taken shall have gone out of the possession of the Senate, announcing their decision, *except a resolution confirming or rejecting a nomination by the President.* In fact, it will be noted from the compilation of Senate, White House and Departmental Precedents that subsequent to the change in the rules on

April 6, 1867, it has been the practice to enter a motion to reconsider and merely to accompany that motion with a request to return the resolution of notification. Previous to the change in the rules, the usual custom had been to request the return of the resolution sent to the President.

While we concede that the parliamentary procedure of one of the Houses in case of legislation is not determinative of that utilized by the Senate in advising and consenting to a nomination, yet it is well settled practice in the House of Representatives that a motion to reconsider may be entertained although the bill or resolution to which it applies may have gone to the Senate or to the President (See Hinds, Precedents of the House of Representatives, Vol. V, §§ 5666-5668). It has also been held that the House is not precluded from voting on a motion to reconsider due to the fact that it had already informed the Senate that it agreed to a Senate amendment to one of its bills (Hinds, *ibid.* § 5672).

The House precedents cited by Hinds conclusively indicate that the Chair based its decision upon a simple and straightforward reading of the rule of the House. The fact that the bill or resolution was no longer in the possession of the House was immaterial. These precedents, we submit, are adverse to the contention of the appellee that the Senate could not here reconsider the nomination unless and until the President returned the notification.

The appellee will probably contend that in the past it has also been the practice of the Senate not to vote upon a motion to reconsider until the notification has been returned. Even so, the vote is merely a completion of the process of reconsideration, already initiated when the motion was entered. Clearly the President cannot kill the power to reconsider, once born, by his refusal to return the notification. He can no more do that than he can thwart its power by the immediate issuance of a commission as contended by the Attorney General.

The Court below offers its explanation of the changes made on April 6, 1867:

"On April 6, 1867, the Senate rule relating to reconsideration was amended. Perhaps it was questioned whether after possession had been lost, reconsideration could ever thereafter be in order under the rule, even if possession was restored by Executive action. The amendment accordingly made the letter of the rule conform to pre-existing usage by excepting nomination cases from the flat declaration that reconsideration was always out of order after loss of possesion, and added the proviso that, in nomination cases, after notification to the President, the motion to reconsider must be accompanied by a request for return" (R. 21).

We believe, however, that an examination of the Hill, Frost and Fisk cases forbids such an interpretation. Why should the Senate be concerned as to whether it could reconsider a nomination voluntarily returned to it by the President? The Senate must have realized that the President, under no obligation to make an appointment even after the Senate had given its advice and consent, could present the same nomination once more. We submit, therefore, that Rule 20 of April 6, 1867, as confirmed by the practice pursuant thereto, contemplates that a motion to reconsider can be made, entered and disposed of even while notification is outstanding in the hands of the President.

PRESIDENTIAL AND SENATORIAL PRACTICE DO NOT SUPPORT THE CONTENTION EITHER THAT THE POWER TO RECONSIDER IS TRUNCATED BY AN IMMEDIATE APPOINTMENT BY THE PRESIDENT OR THAT IT IS CHECKMATED BY HIS REFUSAL TO RETURN THE NOTIFICATION.

The Attorney General, in his opinion, stated that "Senate practice lends weight" to his conclusion that the Senate loses its power to reconsider once an appointment is made (36 Ops. A. G. 382). He did not attempt to define what is meant by the making of an appointment. The appellee, however, in his brief in the Court below, argued this point at considerable length. His understanding of the law is identical

with that of the appellant (R. 18). Nevertheless, a brief review of the principles of law will permit one better to calculate the weight that should be given to the precedents.

According to the decision in *Marbury v. Madison*, 1 Cranch 137, an appointment is complete once the President has placed his signature on the commission. Neither the impression of the seal of the United States nor the delivery of the commission to the appointee is required in order legally to make the appointment. Hence, once the President signs a valid commission an appointee can compel its delivery. Said the Chief Justice in his opinion:

> "These are the clauses of the constitution and laws of the United States, which affect this part of the case. They seem to contemplate three distinct operations:
>
> 1. The nomination. This is the sole act of the president, and is completely voluntary.
>
> 2. The appointment. This is also the act of the president, and is also a voluntary act, though it can only be performed by and with the advice and consent of the senate.
>
> 3. The commission. To grant a commission to a person appointed, might perhaps be deemed a duty enjoined by the constitution. 'He shall,' says that instrument, 'commission all the officers of the United States.'
>
> The acts of appointing to office, and commissioning the person appointed, can scarcely be considered as one and the same; since the power to perform them is given in two separate and distinct sections of the constitution. * * *
>
> *The last act to be done by the president, is the signature of the commission. He has then acted on the advice and consent of the senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the senate concurring with his nomination, has been made, and the officer is appointed.* This appointment is evidenced by an open, unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as it respects the appointment, an in-

choate and incomplete transaction. * * * (Italics added.)

* * * * * * *

It is therefore decidedly the opinion of the court, that when a commission has been signed by the president, the appointment is made; and that the commission is complete when the seal of the United States has been affixed to it by the secretary of state."

So in *United States* v. *Le Baron*, 19 How. 73, it was said:

"When a person has been nominated to an office by the President, confirmed by the Senate, and his commission has been signed by the President, and the seal of the United States affixed thereto, his appointment to that office is complete" (p. 78).

See also

United States v. *Bradley*, 10 Pet. 343, 364;
United States v. *Linn*, 15 Pet. 290, 313;
United States v. *Stewart*, 19 How. 79;
Glavey v. *United States*, 182 U. S. 595, 602-604.

With this definition of the meaning of appointment in mind, we turn to a discussion of the Presidential and Senatorial precedents. We submit that upon consideration they will be found to lend no support to the views advanced either by the learned Attorney General or the Court below. On the contrary, they serve to confirm the claim of power which the Senate has made.

As we have pointed out, the rules of the Senate from March 26, 1806, to April 6, 1867, provided that a motion to reconsider would not be in order after the bill, resolution, message, etc. had gone out of the possession of the Senate announcing its decision. Of course, under such a rule a President could properly refuse to return any resolution to the Senate. Nevertheless, during this period, we find the Presidents returning resolutions to the Senate in almost every requested case. See Senate, White House and Departmental Precedents (R. 34,

et seq.). The return, however, was purely voluntary. It would appear that, despite the provision of the rule, the Presidents were anxious to facilitate the Senate in exercising a sound and thorough consideration of nominations.

It was while the rules were so cast that the Senate in 1830 voted that a nomination to reconsider its refusal to vote to advise and consent to the appointment of Isaac Hill as Second Comptroller of the Treasury was not in order, after the resolution announcing the vote had been forwarded to the President (R. 34).

During the same period there occurred the cases of Joseph K. Barnes, John H. Goddard, H. H. Heath, Westley Frost and A. C. Fisk. These cases, other than that of H. H. Heath, were presented by the appellee in his brief below and referred to by the Court in its opinion, except the case of A. C. Fisk. We shall briefly discuss each of them.

On March 2, 1864, the Senate voted to advise and consent to the appointment of Joseph K. Barnes as Medical Inspector General (R. 39). On March 7, the Senate requested the President to return its resolution. In a letter, dated March 10, received by the Senate on March 15, the President returned the resolution even though a commission had not only been made out and executed but had in fact been delivered to the appointee. On March 18, Senator Johnson withdrew his motion to reconsider (R. 40). The Court below, in its opinion, states (R. 20):

> "This precedent shows that notwithstanding the flat declaration of the Senate that after loss of possession reconsideration was too late, the Senate entertained a motion to reconsider and requested the return of the resolution and then abandoned its course when informed that the President had already appointed."

True enough; but if the Court intends to imply that it is a controlling precedent in the case now before the Court, we submit the contrary—it occurred previous to the change in the rules.

On May 18, 1864, the Senate voted to advise and consent to the appointment of John H. Goddard as Justice of the Peace for Washington County, District of Columbia (R. 41). On June 7, the Senate requested the President to return the notification previously forwarded to him. On June 25, the President informed the Senate by letter that a commission had already been issued to John H. Goddard and the appointment had been perfected. He did not return the resolution. The Executive Journal records no subsequent proceedings on the nomination.

On February 1, 1867, the Senate voted to advise and consent to the appointment of H. H. Heath as Secretary of the Territory of New Mexico (R. 44). This case is not mentioned, either in the brief of the appellee below or in the opinion of the Supreme Court. On February 6, the Senate moved to request the President to return the resolution. On February 8, President Andrew Johnson returned the resolution to the Senate. At the same time he included a letter from the Secretary of State informing him that when the request of the Senate was received at the Department of State, a commission had already been made out and sent to the Executive Mansion for signature and it had never been returned. Presumably the commision had not been signed. The Executive Journal records no subsequent proceeding on this nomination. In other words, despite the return of the resolution (unlike the Goddard case) the Senate apparently took no further action. We call attention to this fact because it shows, we believe, the impossibility of deducing from mere inaction a recognition on the part of the Senate of its lack of power.

On February 23, 1867, shortly prior to the change in the Senate rule governing reconsideration, the Senate voted to advise and consent to the appointment of Westley Frost as Assessor of Internal Revenue for the Twenty-first District of Pennsylvania (R. 46). On February 27, the Senate requested the return of the resolution. In his reply of March 2, the President, without returning the resolution, enclosed a

letter of the Secretary of the Treasury informing him that Mr. Frost, prior to the receipt of the request of the Senate, had qualified for the office and received his commission with instructions to enter upon his duties at once. At the time Mr. Frost had not yet taken his oath of office. On April 1, the first day of the ensuing special session Senator Sherman submitted a resolution that the Secretary of the Treasury be requested to recall the commission issued to Mr. Frost because the confirmation was recalled before he received it or was sworn into office. This resolution was rejected, and, we admit, properly so.

On March 28, 1867, the Senate voted to advise and consent to the appointment of A. C. Fisk as Collector of Internal Revenue for the Third District of Louisiana (R. 48). On March 30, the Senate requested a return of the resolution. On April 2, that is during the succeeding session of Congress, the President returned the resolution. On the next day Senator Henderson moved to consider the motion submitted by him on March 30 to reconsider the nomination. It was objected that such a motion was not in order. The Chair sustained the point of order and the Senate subsequently sustained the decision of the Chair. Again, we admit, the Chair ruled correctly.

And finally, we agree with the Court below in stating that a study of the Senate precedents down to and including March 1867, reveals consistent action by the Senate in declining to reconsider a nomination after notification had been sent to the President (R. 21).

But as we have pointed out, the rule governing reconsideration was amended on April 6, 1867. Moreover, the changes made were fundamental. Prior thereto the Senate retained no power of consideration once a notification had been sent to the President; subsequent thereto the Senate retained power. Accordingly, only the precedents which have arisen since then are of direct significance. These precedents, we submit, show that the President has customarily returned the notifications to the Senate despite the fact that commissions had already been signed by him.

Before discussing these specific precedents which, we believe, support our understanding of the Senate rules as existing subsequent to April 6, 1867, a word should be said about the record sources. They are three: The Senate Executive Journal, records in the Executive Offices of the White House and the records of the Department concerned (R. 31). The records taken from the Senate Executive Journal are explained at page 31 of the Transcript of Record. On page 32 the records contained in the Executive Offices of the White House are explained. We wish to add, however, a description of the method of keeping those records. The entries under the headings other than "Action of Senate" or "Confirmed" and "Date of Commission" or "Commissioned"* and "Remarks" are filled in immediately after the nomination is sent to the Senate. The entry under the heading "Action of Senate" or "Confirmed" is made when the President receives the notification from the Senate of its action. The entry under the headings "Date of Commission" or "Commissioned" is made immediately after the commission is signed, if a commission is signed, and before the commission is sent out from the Executive Offices of the President. The entries under the heading "Remarks" are inserted at the appropriate time. For instance, if a request for the return of the notification is sent to the White House entry of that fact is then made. This method of recording is substantiated by the practice of making two entries in certain cases. See, for instance, those of Green C. Chandler (R. 76), William H. Tubbs (R. 76-77), Horace Austin (R. 77), Norman Buck (R. 77-78) and John P. Clum (R. 79).

Perhaps the appellee will contend that it is impossible to know exactly the course of practice in keeping these records. The description given by us was obtained from officials at the Executive Offices, who have been and are now in charge of keeping those records. At any rate, this course of practice

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* The use of the headings "Confirmed" and "Commissioned" began on March 4, 1905 (R. 99), and continued thereafter.

is the natural and reasonable one to expect was followed. We submit that the appellee cannot offer a more reasonable and likely explanation of how the records were kept.

We call to the attention of the Court eighteen precedents which definitely support the power of the Senate to reconsider the nomination of the appellee under circumstances similar to those at bar. They are:

(1) *Samuel M. Pollock* (R. 50).

On April 8, 1867, the Senate voted to advise and consent to his nomination as Brigadier-General by brevet. On April 10, a motion to reconsider was made and the return of the resolution previously sent to the President was requested. The President returned the resolution on April 11. The records of the Department of War show that a commission was made out to Samuel M. Pollock under date of April 11, 1867, but subsequently cancelled (R. 50). The Register of Brevet Commissions, Volume V (1861 to 1867) at page 120, records April 11, 1867, as the date of a commission to Samuel M. Pollock as Brigadier-General by brevet of the United States volunteers bestowed for faithful and meritorious service. The commission was given under the names of President Andrew Johnson and Secretary of War Edwin M. Stanton. The register also shows on the same page a notation in red ink reading "Cancelled (Rejected by the Senate)." This information is confirmed by General Order No. 84, dated "War Department Adjutant General's Office October 14, 1868", found in General Orders and General Court Martial Orders of 1868.* On this order there is also noted in red ink the words "Cancelled (Rejected by the Senate)." The Senate recommitted the nomination on April 11. On the same date the committee reported the nomination adversely. On April 13 the Senate voted to reject the nomination. The Executive Journal shows that on December 11,

* These records are kept in the Munitions Building at Washington, D. C.

1867, he was again nominated to be Brigadier-General by brevet (Executive Journal, Vol. 16, p. 77). His nomination was reported favorably from committee on January 16, 1868 and confirmed by the Senate on February 14, 1868 (*ibid*, pp. 134, 168).

(2) *Noah L. Jeffries* (R. 52).

This is a very clear case in which the President returned a notification to the Senate after a commission had been issued to the appointee. In fact, he had already entered upon the discharge of the duties of the office of Register of the Treasury. On February 12, 1868, the Senate voted to advise and consent to his appointment. On February 14, the Senate moved to reconsider and to request the return of the resolution previously sent to the President. And on February 19, the President returned the resolution, together with a letter of the Secretary of the Treasury in which the Secretary stated that "in the ordinary transaction of business the commission was issued on the 14th instant by the State Department, and was received at this Department on the 15th instant" (R. 54).

On February 24 the Senate referred this letter of the President to the Committee on the Judiciary in order that the Committee might determine whether the Senate had power to reconsider its vote of confirmation. The Committee on March 12 reported that the Senate would have the power to reconsider its vote though a commission had actually been issued to the appointee. The report of the Committee, as given in the Executive Journal, is set out at pages 53-54 of the record. The Journal contains no record of any further proceeding by the Senate on this nomination. It does appear, however, that Jeffries during the same session was nominated for a different office, that of Commissioner of Internal Revenue and was rejected by the Senate on July 25, 1868 (R. 55).

It is somewhat strange that no reference to this precedent was made by the Court below in its opinion. The appellee,

in his brief to that Court, mentions the precedent but attempts to destroy its force by stating that,

> "This view was expressed in 1868, in the height of the controversy between President Johnson and Congress and its authority is not beyond question" (Br., p. 13).

(3) *Lewis A. Scott* (R. 56).

On June 7, 1870, the Senate voted to advise and consent to his appointment as Postmaster at Lowville, New York. On the same day it ordered that the President be notified forthwith. On June 9 a motion to reconsider was entered and the return of the resolution was requested. It was returned by the President on June 13. The White House record shows that a commission was in the meantime issued to him on June 7, 1870. A later entry under date of June 18, shows "Confirmation returned—motion to reconsider withdrawn."

(4) *John W. Bean* (R. 59).

On January 11, 1872, the Senate voted to advise and consent to his appointment as First Lieutenant in the Fifteenth Infantry. On January 23, the Senate requested the return of the resolution. On February 1, the Senate adopted a motion to reconsider its resolution. The nomination was recommitted to the proper committee and no further action seems to have been taken upon it.

Yet the White House record indicates that a commission was made out to him on January 17, 1872. The President apparently considered the commission which he had thus signed of no legal force, for on June 5, 1872, he nominated Bean for promotion to First Lieutenant in the Fifteenth Infantry—the same promotion as in the nomination voted upon by the Senate on January 11, 1872.

It is true that the Journal does not record whether the President returned the resolution requested by the Senate. If the President did return the resolution, it violates the theory proposed by the Attorney General that the practice in-

dicates that the Senate's request comes too late if a commission has already been signed. If the President did not return the resolution, it violates the theory advanced by the appellee in the Court below that the Senate cannot proceed in its reconsideration of a nomination unless the notification has been returned to it.

(5) *James F. Legate* (R. 60).

The Senate voted to advise and consent to his appointment as Governor of Washington Territory on January 26, 1872. On February 1, the Senate moved to reconsider its vote and to request the return of the resolution. The President, on April 9, withdrew the nomination. In the meantime, however, a commission had been signed. This appears from the records of the White House and of the Department of State. The appellee in his supplemental brief in the Court below admits that "Here a commission was signed after notice of consent and before request to return".

In the files of the State Department there is a card reading as follows (R. 60):

> "Legate, James F. Kans.
> Governor of Washington Territory,
> Misc. 3, p. 66. January 26, 1872 conf.
> Appointment Cancelled."

The words "Appointment Cancelled" are typed in red. In a record of the State Department labeled "Miscellaneous Commissions Permanent and Temporary, Jan. 16, 1871 to March 13, 1885", Volume III, at page 66, there appears a copy of a commission issued to James F. Legate of Kansas to be Governor of Washington Territory. In this commission it is stated (R. 61):

> "* * * Given under my hand, at the City of Washington, the Twenty-sixth day of January in the year of our Lord one thousand eight hundred and Seventy-two

and the Independence of the United States of America the Ninety-sixth.

U. S. GRANT.

By the President.
Hamilton Fish
Secretary of State."

On the upper left-hand corner of this copy of the commission issued to Mr. Legate appears in black ink a notation *"Cancelled"*.

The signing of a commission on January 26, 1872, is also recorded in the White House record (R. 60). Incidentally, it may be noted that the entries in the White House record, made in inks of different color and in pencil, were most likely made at different times. In a letter recently written by the Office of the President to counsel for the appellee it is stated that,

> "the records of the executive office indicate that a commission was issued by the President on January 26, 1872" (R. 110).

From these records it appears that, despite the fact that an appointment had been made, President Grant withdrew the nomination, thereby admitting the power of the Senate to reconsider. The Court below made no mention of this case in its opinion.

(6) *George Nourse* (R. 61).

On June 5, 1872, the Senate voted to advise and consent to his appointment as Register of Linkville Land Office, Oregon. A motion to reconsider was entered and the return of the resolution requested on June 7. The Journal does not record whether or not the resolution was returned. At any rate, on June 10, the Senate reconsidered its vote and placed the nomination on its calendar. No further proceeding was taken upon this nomination during the session. The White

House record indicates that a commission was made out to him on June 8, 1872. Under the heading "Remarks" there appears in pencil a statement "Withdrawn by Senate June 10. Com. not issued". It is manifest that the remark that the commission was not issued meant that the commission was not delivered. If the commission had not been signed, there would have been no entry under the heading "Date of Commission". There are numerous cases where there is no entry under that heading.

From the record of the White House it appears that the President did not consider his commission of June 8, 1872, as legal, for during the next session he nominated him for the same office and in his letter of nomination referred to Nourse having been commissioned during the recess of the Senate.

As in the Bean case, there is no record of the return of the resolution. The same comment there made is applicable.

(7) *Alva A. Knight* (R. 64).

On January 21, 1873, the Senate voted to advise and consent to his appointment as United States Attorney for the Northern District of Florida. On January 27, a motion to reconsider was entered and the return of the resolution requested. It was returned on January 31. The White House record shows that in the meantime a commission was issued January 21, 1873. Although the motion to reconsider was subsequently withdrawn and the resolution of confirmation returned to the President, it cannot, of course, be argued that this was a confession by the Senate of its lack of power to reconsider while, on the other hand, the Executive recognized that reconsideration was not barred by the issuance of a commission.

The records of the Department of State contain a copy of a commission issued to him on January 21, 1873 (R. 64).

(8) *Belle C. Shumard* (R. 64).

On February 6, 1873, the Senate voted to advise and consent to her appointment as Deputy Postmaster at Fort Smith, Arkansas. On February 25, a motion to reconsider was entered and the return of the resolution requested. The resolution was returned on March 1. On the same day, the nomination was recommitted. No further proceeding was taken upon this nomination. The White House record shows that a commission was issued February 6, 1873. The letter of President Grant, under date of December 15, nominating Valentine Dell to the office in place of Thomas G. Scott, conclusively shows that the President, the issue of a commission to Shumard to the contrary notwithstanding, considered that no appointment had ever been made.

(9) *Peter C. Shannon* (R. 66).

On March 17, 1873, the Senate voted to advise and consent to his appointment as Chief Justice of the Supreme Court of Dakota Territory and ordered that the President be notified forthwith. On the next day a motion to reconsider was entered and the return of the resolution requested. On March 21, the President returned the resolution and on the same day the Senate, upon its reconsideration, again confirmed the nomination. It appears from the White House record that prior to the receipt of the request of the Senate to return the resolution, a commission had been issued March 17, 1873. The entries under the heading "Remarks" are indeed interesting. It appears that on March 20, the White House received the request of the Senate recalling the resolution of confirmation. The matter was then referred to the Attorney General, and despite the fact that a commission had already been signed, the resolution was returned to the Senate on March 21, presumably upon the recommendation of the Attorney General. At the same time the delivery of the signed commission was held up until the nomination was reconfirmed on March 21. It also appears from the entry under

"Date of Commission" that a new commission was signed, clearly implying that one had previously been signed.

(10) *E. Raymond Bliss* (R. 66).

On March 18, 1873, the Senate voted to advise and consent to his appointment as Deputy Postmaster at Columbus, Mississippi, and ordered that the President be notified forthwith. On March 20 a motion to reconsider was entered and the return of the resolution requested. The resolution was returned on March 22. On the same day a motion to reconsider, when put to a vote, failed. The White House record shows that in the meantime the commission had been issued March 18, 1873. The entries under "Remarks" in this case are also revealing. On March 20 the White House received the request of the Senate to return its resolution of March 18. On the next day the matter was apparently referred to the Postmaster General, for there is an entry reading "3/21. P. M. G.". And again on March 22, the resolution was returned to the Senate.

(11) *John W. Clark* (R. 68).

On March 20, 1873, the Senate voted to advise and consent to his appointment as Deputy Postmaster at Montpelier, Vermont, and ordered that the President be notified forthwith. On March 21, the confirmation was reconsidered and recalled. On March 25 the President returned the resolution. While the Journal records no subsequent proceeding on the nomination, the White House record states under "Remarks" that confirmation was received back on March 26. It appears from the White House record that a commission was issued to him March 20, 1873.

(12) *William H. Tubbs* (R. 76).

On December 20, 1878, the Senate voted to advise and consent to his appointment as Postmaster at New London, Connecticut, and on the same day ordered that the President be

notified forthwith. On January 7, 1879, a motion to reconsider was entered and the return of the resolution requested. On January 9, the President returned the resolution. The next day, upon reconsideration, the nomination was recommitted and on January 14, it was again confirmed. The White House record shows that in the meantime a commission had been signed. Under the heading "Date of Commission" there is the following entry, "Dec. 20, 1878", which was written in pencil and appears to have been erased. However, it is still barely legible.

(13) *Joseph H. Durkee* (R. 78).

On June 30, 1879, the Senate voted to advise and consent to his appointment as Marshal of the Northern District of Florida and on the same day ordered that the President be notified forthwith. On July 1, a motion to reconsider was entered and the return of the resolution requested. On the same day the President returned the resolution. After its return the Senate laid the motion to reconsider on the table. The White House record shows the issue of a commission June 30, 1879. The appellee, in his supplemental brief in the Court below, admits that in this case the President complied with the request of the Senate at a date subsequent to the issuance of the commission, as shown by the records of the White House.

(14) *Laban J. Miles* (R. 83).

On February 15, 1883, the Senate voted to advise and consent to his appointment as Indian Agent at Osage Agency, Indian Territory, and on the same day ordered that the President be notified forthwith. On February 22, a motion to reconsider was entered and the return of the resolution requested. The resolution was returned on February 26. The motion to reconsider was subsequently withdrawn on February 27. The White House record shows that a commission had in the meantime been issued on February 20, 1883.

This is confirmed by the records found in the Department of Interior (R. 83). In a vault of the Indian Office in the Department of the Interior there is a record marked "Executive appointments confirmed from 187[9] to [1891]". At page 117 of this record there is a copy of a commission issued to Miles as agent for the Indians of the Osage Agency in the Indian Territory. This copy reads in part as follows:

> "* * * during the term of FOUR YEARS from the 27th day of February, 1883, unless this commission be sooner revoked by the President of the United States for the time being * * *
>
> * * * * * * *
>
> GIVEN UNDER MY HAND at the city of Washington, the twentieth day of February in the year of our Lord one thousand eight hundred and eighty-three and of the independence of the United States of America the one hundred & seventh.
>
> CHESTER A. ARTHUR.
>
> By the President:
> H. M. Teller,
> Secretary of the Interior."

The term stated in this copy of the commission ran from February 27. This is explained by a record labelled "Roster of Inspectors, Agents, &c, Indian Office No. 2" also found in the vault mentioned above which shows that Miles had served under a previous commission which began February 27, 1879 and ran to February 26, 1883. The same record shows that under the commission given on February 20, 1883, he served up to April 20, 1883 (R. 84).

(15) *George W. Pritchard* (R. 84).

On February 19, 1883, the Senate voted to advise and consent to his appointment as United States Attorney for the Territory of New Mexico and on the same day ordered that the President be notified forthwith. On February 21, a motion to reconsider was entered and the return of the resolution requested. On February 24, the resolution was returned.

The Senate proceeded to vote upon its motion to reconsider but it failed of adoption. The White House record shows that in the meantime a commission was issued to him February 19, 1883.

(16) *Thomas H. Reeves* (R. 88).

On April 9, 1884, the Senate voted to advise and consent to his appointment as Indian Agent at Quapaw Agency, Indian Territory, and on the same day ordered that the President be notified forthwith. On April 10, a motion to reconsider was entered and the return of the resolution requested. On April 14, the President returned the resolution. On the same day the nomination was recommitted. On June 26, the President sent a message withdrawing the nomination. The White House record shows that in the meantime a commission had been issued April 11, 1884. The appellee, in his supplemental brief in the Court below, dismisses this precedent with the observation that the entry was scratched out. But it would seem rather to enhance its value.

Incidentally the entries in the White House record in this case exemplify the manner of keeping those records; that is, the entry under "Action of Senate" is made as soon as a notification is received. The entry under "Date of Commission" is made as soon as the commission is signed and statements under "Remarks" concerning the return of the resolution made when the resolution is so returned. It is clear that the entries under "Action of Senate" and "Date of Commission" were made prior to the notations under "Remarks" for they are in ink different from that used for the entries under "Remarks".

(17) *Edwin I. Kursheedt* (R. 92).

On March 27, 1889, the Senate voted to advise and consent to his appointment as Marshal for the Eastern District of Louisiana and on the same day ordered that the President be notified forthwith. On March 29, a motion to reconsider

was entered and the return of the resolution requested. Although the Journal does not record whether or not the resolution was returned, it does indicate that the nomination was referred to the Judiciary Committee on April 1 and the resolution was reconsidered and the nomination placed on the calendar on April 2. No further proceeding was taken on the nomination. The White House record shows that a commission was issued to him March 27, 1889. Moreover, from the record in this case, it appears that the President recognized that Kursheedt had never been appointed, for in his later letter nominating John B. Donally for the place he made the nomination vice Reuben B. Pleasants just as he had done when he nominated Kursheedt.

Again it appears from the record in this case that the entries under the various headings in the White House record were made *pari passu* with the events. The pencil line through March 27, 1889, was apparently drawn at the time of the entry of the notation under "Remarks" for this is likewise made in pencil.

With respect to the absence of a record in the Journal as to the return of the resolution, the comment made, *supra*, under the case of John W. Bean is applicable.

(18) *William Plimley* (R. 97).

During the administration of President Roosevelt this most interesting and significant case arose. On March 10, 1903, the Senate voted to advise and consent to the appointment of William Plimley as Assistant Treasurer of the United States at New York City. But two days later the Senate moved to reconsider its vote and directed its secretary to request the President to return to it the resolution which had been forwarded to him. On March 13, President Roosevelt returned the resolution to the Senate, and on March 18 withdrew the nomination entirely. Yet, prior to the time the President returned the resolution to the Senate, it conclusively and indisputably appears from the records of the White House and of the Treasury Department that a

commission had in fact been signed and sealed, that is, an appointment had been made. What happened between March 10 when the Senate voted to advise and consent to the appointment of William Plimley and March 13 when the President returned the resolution to the Senate, is seen from a memorandum apparently prepared at the time. This memorandum found in the records of the Treasury Department reads as follows (R. 97):

> "Letter from Mr. Loeb, Secretary to the President, about March 9th, stating that the President desired nomination prepared and sent over for William Plimley of New York, to be Assistant Treasurer at New York.
>
> Nomination prepared and sent to the President March 10th.
>
> Notice of nomination and confirmation in Congressional Record of March 10th.
>
> Official notice of confirmation from the Secretary of the Senate, through the White House, dated March 10th, received at the Appointment Division March 11th.
>
> Commission prepared March 12th and sent to the White House; was signed by the President, attested by the Secretary of the Treasury, received the seal of the Treasury Department, and a letter notifying Mr. Plimley of his appointment and enclosing official bond for execution by him was prepared and mailed, addressed, 'William Plimley, 151 West 8th Street, New York City'; all of which occurred on the same date.
>
> Shortly after four o'clock on March 12th, the Chief of the Division of Appointments was called up on the telephone by the White House and asked what papers were on file in the Plimley case, to which the Chief replied, all papers which accompanied the President's direction that nomination be prepared and no others. The White House then asked what was the status of the case; answer: Commission signed by the President had received the seal of the Treasury Department; that a bond had been prepared, and letter notifying Mr. Plimley of his appointment had been placed in the mail. White House asked to hold up everything until Mr. Latta of the White House staff could come over. Mr. Latta immediately came to the Division of Appointments bringing with him the resolution of the Senate recalling

its notice of confirmation, and with the direction of the President to get commission and all papers in the case and take them with him to the White House.

The Chief of Appointment Division conferred with the Secretary and, with his knowledge and consent, gave to Mr. Latta all papers on file here, but did not deliver the commission, the same being inaccessible at that time.

The Chief of Appointment Division, on his own responsibility, but with the knowledge of the Secretary, intercepted bond and letter mailed to Mr. Plimley in the Washington City Post Office and had it returned to the Department.

The next day, at the request of the President, Mr. Plimley's commission, together with a brief containing citations from the decisions of the Supreme Court of the United States and the Attorney General, was taken to the White House by the Secretary, where they still remain.

On March 18th directions were received from the White House by telephone to prepare a request for the withdrawal of the nomination of Mr. Plimley from the Senate. Request was promptly prepared and taken to the White House by the Chief of Division of Appointments, who delivered the same to Mr. Loeb, the President's Secretary. Later in the day directions were received by wire from the White House to prepare a nomination of Hamilton Fish of New York as Assistant Treasurer at New York in place of Jordan, deceased. Nomination prepared and sent to the White House by messenger."

The files of the Treasury Department, moreover, contain unquestionable evidence that a commission had been signed by the President prior to his return of the resolution. This evidence confirms the statement in the memorandum just quoted that a commission was prepared, signed by the President, attested by the Secretary of the Treasury and impressed with the seal of the Treasury Department prior to the return of the resolution of March 13 by the President (R. 98). In the files there is the original letter of March 12, 1903, and the original envelope addressed to "Mr. William Plimley, 151 West 80th St., N. Y. City". The envelope is post-marked

"March 12 5:30 P. M., 1903" and has on it a notation in red ink reading "Return to writer on request by phone, 3.12.03 #74". In the envelope there is an official bond in the amount of $400,000 and, also, a slip of paper with a notation "Senate notice of confirmation to Plimley sent to Pres. March 13, 03 at his request". The letter of March 12 addressed to William Plimley shows beyond doubt that Mr. Plimley had already been appointed by the President to the office of Assistant Treasurer of the United States at New York City, for the letter reads as follows (R. 98):

"Notice of Appointment under Confirmation
and Transmitting Bond.

Treasury Department,
Office of the Secretary,
Washington, D. C.
March 12, 1903.

Mr. William Plimley,
151 West 80th Street,
New York City.

Sir:

By direction of the Secretary, I have to inform you that the President of the United States has, by and with the advice and consent of the Senate, appointed you to the office of Assistant Treasurer of the United States at New York, N. Y., by a commission dated March 12, 1903.

You will therefore enter into bond with the United States in the penal sum of four hundred thousand dollars ($400,000.) in accordance with the enclosed form and the rules regulating the execution thereof, and transmit the same to this office for examination, approval and file.

Your commission will be forwarded when your official bond shall have been received and approved.

Respectfully,

(Signed) CHAS. LYMAN,
Chief, Division of Appointments."

(Incl.)

The signing of a commission on March 12, 1903, as indicated by the records of the Treasury Department, is con-

firmed by the White House record (R. 97). Once more attention is called to the fact that the White House at present interprets the entries under the heading "Date of Commission" or "Commissioned" as the date on which the commission was actually signed. See letter from the Office of the President to counsel for the appellee (R. 110).

It is interesting to note that the power of the Senate to reconsider the nomination of Plimley was apparently referred to the office of the Attorney General. A brief was prepared on the point (R. 98). With the cooperation of the office of the Attorney General we attempted to trace this brief, but were unsuccessful. But at any rate, in view of the subsequent action by the President, it is not too bold to presume that the opinion of the Attorney General was in favor of the power of the Senate.

The Court below in its opinion made no mention of this case, though it was presented and emphasized by the appellant. The appellee, while admitting that the records of the White House and of the Treasury Department indicate that a commission to Plimley had been signed by the President before the receipt of the Senate's request for a return, commented at page 22 of his brief as follows:

> "The Plimley case, therefore, is not one in which the President stood upon his rights and maintained the title of his appointee, but one in which the President and the Senate *joined in ignoring* the technical rights of the office holder." (Italics added.)

Now turning to the cases occurring since the fundamental changes in the rules on April 6, 1867, upon which the appellee rests, we find there are only three: *B. A. Boseman*, *J. C. S. Colby* and *Morris Marks*. The Court cites these three cases in its opinion. We shall discuss each of them.

(1) *B. A. Boseman* (R. 67).

On March 18, 1873, the Senate voted to advise and consent to his appointment as Deputy Postmaster at Charleston

Court House, South Carolina. On the same day it was ordered that the rule be suspended and that the confirmation be transmitted forthwith to the President. Two days of actual executive session, March 19 and 20, went by without further action. On March 21, the President sent a letter to the Senate withdrawing the nomination, although it appears from the White House record that in the meantime a commission had been issued March 18. The Senate, wishing the appointment to stand, denied by formal resolution the power of the President to withdraw.

In his brief in the Court below, the appellee placed considerable emphasis upon this case. He argued that the decision of the Senate that the nomination could not be withdrawn by the President on March 21, because it had been confirmed and finally disposed of and because the same had gone out of its possession implied a forceful recognition by the Senate of the limitation upon its power to reconsider. But the appellee below apparently overlooked the fact that not only had the rule been formally suspended, but also that there had been, prior to the receipt of the letter withdrawing the nomination, two executive sessions which cut off the power of the Senate to reconsider. The stage of finality had been reached. It would seem that if the President wished to retrace his steps the proper method was to revoke the appointment he had duly made, and remove the appointee, rather than attempt an alteration of the parliamentary status.

The Court below in its opinion rested heavily upon this case. It found in the case evidence that the Senate all the while consistently adhered to the principle stated by Jefferson which we have discussed (R. 22). We submit, however, that the Boseman case, when properly understood, offers no support to the construction proposed by the appellee and adopted by the Court below.

(2) *J. C. S. Colby* (R. 69).

On December 17, 1874, the Senate voted to advise and consent to his appointment as Consul at Chin Kiang and ordered

that the President be notified forthwith. On December 21, a motion to reconsider was entered and the return of the resolution was requested. On January 5, 1875 the President wrote the Senate that a commission for the appointee had been signed on December 17, and that prior to the receipt of the request the commission had been forwarded by mail to the appointee. No further proceeding appears to have been taken on this nomination.

It was contended by the appellee in the Court below that in this case there was again a recognition by the Senate of its lack of power to reconsider a nomination if the resolution were not returned and a commission had in the meantime been issued. The Court below in its opinion similarly cited the case in support of its decision and stated with respect to it that "the Senate accepted this reply of President Grant as conclusive" (R. 23). We submit, however, that this case cannot be so applied. The rigid legal question of the power of the Senate was never faced. It would seem that the President, on one hand, did not consider it within his power to refuse to return the resolution and that the Senate, after the receipt of the information furnished by the President, on the other hand, was not disposed to insist upon it.

We wish, however, in connection with this case to call attention to the fact that the White House record shows under the heading "Date of Commission", "December 17, 1874". The President's letter confirms the interpretation of that entry as meaning that the commission was signed by him on the 17th day of December (R. 70).

(3) *Morris Marks* (R. 74).

On June 6, 1878, the Senate voted to advise and consent to his appointment as Collector of Internal Revenue of the District of Louisiana and on the same day ordered that the President be notified forthwith. On June 11, a motion to reconsider was entered and the return of the resolution requested. The President, in his reply of June 14, informed the Senate that upon receipt of the notice of confirmation

the commission of Marks was signed and delivered to him on June 8. Though the Journal records the fact that this message was read, it contains no subsequent reference to the case.

As in the case of J. C. S. Colby, the appellee and the Court below considered this case as of real weight. We submit, however, that it is impossible now to read into the record reasons why the Senate did not proceed further in the matter.

Again in this case, we desire to point out that the record entry, June 8, 1878, under the heading "Date of Commission" is again confirmed by the President's letter as the date on which the commission was signed by him.

POINT II.

In adopting Rules XXXVIII and XXXIX the Senate did not exceed the power vested in it by Article I, Section 5, of the Constitution. The Rules are binding on both the Senate and the Executive.

We have already seen that Rules XXXVIII and XXXIX upon their face, in plain and unambiguous terms, provide that the Senate shall have unrestricted power to reconsider within the next two days of actual executive session any confirmation or rejection previously made by it. We have also seen that the rules contain no tangible or explicit basis for asserting that the President may under certain circumstances truncate this power either by issuing a commission or by refusing to return the notification. But it may be contended by the appellee that to apply the rules as their terms demand would render them obnoxious to the Constitution by giving to the Senate the power of removal from an office once assumed. We submit, however, that the Senate in providing in its rules that it should unqualifiedly retain

the power to reconsider until the expiration of two days of executive session did not exceed the power vested in it by the Constitution to "determine the rules of its proceedings" (Article I, Section 5). It is unnecessary for this Court to adopt a forced and unnatural construction of the rules in order to preserve their validity.

There can be no doubt that the power vested in the Senate to determine the rules of its proceedings, like all other powers, has its limitations. Not every exercise will be sanctioned. But what are the tests adopted by this Court to determine when a rule is not binding upon the coordinate branches of the Government? The only decision relating to the standing rules of a House of Congress is *United States* v. *Ballin,* 144 U. S. 1. In this case the validity of a certain act was challenged on the ground that a proper quorum was not present in the House of Representatives at the time of its passage. The House had a rule expressly providing what should constitute a quorum. This Court held that since the provisions of the rule were in fact satisfied and the rule was valid and binding, the act could not be challenged. Mr. Justice Brewer in his opinion stated:

> "The action taken was in direct compliance with this rule. The question, therefore, is as to the validity of this rule, and not what methods the Speaker may of his own motion resort to for determining the presence of a quorum, nor what matters the Speaker or clerk may of their own volition place upon the journal. Neither do the advantages or disadvantages, the wisdom or folly, of such a rule present any matters for judicial consideration. With the Courts the question is only one of power. The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just. It is no

> objection to the validity of the rule that a different one has been prescribed and in force for a length of time. The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal" (pp. 4-5).

From this opinion it would appear that the tests to be applied by this Court in the case before it are these:

1. Do Rules XXXVIII and XXXIX "ignore constitutional restraints or violate fundamental rights?"

2. Is there "a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained?"

If the former test can be answered negatively and the latter affirmatively, then, as stated by Mr. Justice Brewer neither "the advantages or disadvantages, the wisdom or folly, of such a rule present any matters for judicial consideration. With the courts the question is only one of power."

These tests are, of course, not novel. In essence they are identical with the tests applied by this Court for the determination of the constitutionality of the exercise of any power vested in Congress or in either House. As the Chief Justice stated in the oft-quoted passage from *McCulloch* v. *State of Maryland*, 4 Wheat. 316, 17 U. S. 315:

> "The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception (pp. 409-410).
>
> * * * * * * *
>
> We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be

transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional" (p. 421).

Adjudications by State courts which deal specifically with the reconsideration of action taken by a legislative body, have consistently applied the tests announced in *United States* v. *Ballin*. See, for instance,

Smith v. *Jennings*, 67 S. C. 324; 45 S. E. 821 (1903);
State v. *Savings Bank of New London*, 79 Conn. 141, 152; 64 Atl. 5, 9 (1906);
Crawford v. *Gilchrist*, 64 Fla. 41; 59 So. 963 (1912);
People v. *Common Council of Rochester*, 5 Lans. (N. Y.) 11, 14-15 (1871), and
State ex rel. West v. *Butler*, 70 Fla. 103, 120; 69 So. 771, 776 (1915).

In *State* v. *Savings Bank of New London, supra*, at page 152, the Supreme Court of Connecticut stated:

"There being no claim of a violation of any constitutional restriction, we cannot pass upon the regularity of these proceedings. The power of the House, directly after the passage of a bill, and on the day of its passage, to suspend the operation of that vote, to reconsider the vote, and to take different action, cannot be questioned. The Constitution declares that each House shall determine the rules of its own proceedings and shall have all powers necessary for a branch of the legislature of a free and independent State. Rules of proceedings are the servants of the House and subject to its authority. This authority may be abused, but when the House has acted

in a matter clearly within its power, it would be an unwarranted invasion of the independence of the legislative department for the court to set aside such action as void, because it may think that the House has misconstrued or departed from its own rules of procedure."

In *Crawford* v. *Gilchrist, supra,* pages 54-55, the Court adopts the reasoning of *United States* v. *Ballin:*

> "The Constitution expressly provides that 'each House shall * * * determine the rules of its proceedings'; * * * The provision that each House '*shall* determine the rules of its proceedings' does not restrict the power given to the mere formulation of standing rules, or to the proceedings of the body in ordinary legislative matters; but, *in the absence of constitutional restraints,* and when exercised by a majority of a constitutional quorum, such authority extends to the determination of the propriety and effect of any action as it is taken by the body as it proceeds in the exercise of any power, in the transaction of any business, or in the performance of any duty conferred upon it by the constitution."

IN RULES XXXVIII AND XXXIX THERE IS A "REASONABLE RELATION BETWEEN THE MODE OR METHOD OF PROCEEDING ESTABLISHED BY THE RULE AND THE RESULT WHICH IS SOUGHT TO BE ATTAINED."

In applying the test expounded by Mr. Justice Brewer, it is pertinent to consider how the provisions of Rules XXXVIII and XXXIX fit into the entire process of nomination, confirmation and appointment of an officer. From an examination of the rules it definitely appears that the Senate sought to make them reasonable and practical in their application. To begin with, the Senate took care that Rule XXXVIII should not foster mere obstructive tactics. A motion for reconsideration can be made only by a Senator who voted with the majority. Such a provision was incorporated in the first rules of the Senate adopted on February 25, 1790 (R. 25), and has since formed a part of any and every rule relating to

reconsideration of any action previously taken by the Senate. In fact, this provision forms part of the normal system of American parliamentary procedure.* The Senate sought also to limit to a reasonable period the time within which such a motion would be in order. For it provided that the motion can be made only "on the same day on which the vote was taken or on either of the next two days of actual executive session of the Senate". The rules of March 26, 1806, permitted reconsideration "within the three next days of actual session of the Senate thereafter" (R. 25-26). On January 3, 1820, however, the period of three days was cut down to two (R. 26). The same period was retained in the rules of April 6, 1867 (R. 27), and in the rules adopted on March 25, 1868 (R. 27). When the Senate on January 17, 1877, adopted Rule 74 dealing specifically with the reconsideration of a nomination in closed executive session, it was provided that the motion could be made only "on the same day on which the vote was taken, or on either of the next two days of *executive* session of the Senate" (R. 29). At this point it may also be noted that the present Rule XIII relating to the reconsideration of all other action by the Senate adopts the period of two days of actual session thereafter.

It may perhaps be contended by the appellee that the period of two days of actual executive session after the vote of the Senate is taken may turn out in certain instances to be unduly extended in point of actual calendar time. The Court below envisaged this possibility (R. 24-25). But the same accusation, of course, could be levelled in a lesser degree against the provision that the motion can be made at any time within the next two days of ordinary session. But in answer to this, suffice it to state that the practice of the Senate since the adoption of this provision on January 17, 1877, has been to

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*Jefferson, Manual of Parliamentary Procedure, Section XLIII, and Henry M. Robert, Manual of Rules of Order for Deliberative Assemblies, Ed. of 1890, p. 66. See also *Witherspoon* v. *State*, 138 Miss. 810, 103 So. 124 (1925), and *People* v. *City of Rochester*, 5 Lansing (N. Y.) 11 (1871).

go into executive session very often, although it be only for a short time. Under the rules it is sufficient that the Senate go into executive session for a moment. A comparison of executive and legislative sessions in point of frequency during the last session of Congress is presented herewith as Appendix A, showing that no undue delays are possible because of the infrequency of executive sessions. Yet even if it were possible to point to a few unusual instances in which the Senate did not go into executive session for many days or conjure up even more exaggerated situations, the reasonableness of the means adopted by the Senate is nevertheless not impugned. The reasonableness of the reconsideration rule is to be tested by the usual and general practice of the Senate. Its possible inconvenience or hardship in a supposititious case does not brand it as invalid.

Ex parte Kearney, 7 Wheat. 38, 45;
Evans v. *Jordan*, 9 Cranch 199, 203;
Magoun v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 299-300;
United States v. *Delaware & Hudson Co.*, 213 U. S. 366, 405;
Boudinot v. *United States* (Cherokee Tobacco), 11 Wall. 616, 620.

And finally an attack on the rule on the ground of its possible dilatory character is repelled by recalling that the Senate has the unquestioned power to delay action on a nomination during the entire period of its session. It may also be added that this period of reconsideration is sanctioned by a legislative practice extending from January 17, 1877, or for more than half a century.

The Senate likewise undertook to make the reconsideration rule reasonable and practical by providing in paragraph 5 of Rule XXXVIII that any motion to reconsider a vote upon a nomination which shall be pending at the time the Senate shall adjourn or take a recess for more than thirty days shall fall. This provision also appeared in Rule 37,

adopted on March 25, 1868 (R. 28), and formed part of Rule 76 of the rules of January 17, 1877 (R. 30).

Further proof of the desire of the Senate to have its rules bear a reasonable relation to the result sought to be attained and to prevent hurtful delays is to be found in the provision of paragraph 3 of Rule XXXVIII whereby any action of the Senate on a nomination can forthwith be made final by making a motion to reconsider and tabling the same. This provision first appeared in Rule 74 adopted on January 17, 1877, and has since been part of the reconsideration rule (R. 29).

Turning specifically to the effect of the rules on the President, it will be seen that in this respect also the rules are reasonable and appropriate to the end sought by the Senate in their adoption. The Senate notifies the President of every vote confirming or rejecting a nomination by forwarding to him an authenticated transcript of the resolution indicating its action upon the particular nomination. See paragraph 4 of Rule XXXVIII and Rule XXXIX. If the resolution is sent to the President after the expiration of the period within which the Senate can reconsider its action, or in case a motion to reconsider has been made, after it has been disposed of, no difficulties in the practical administration of the rule arise. But even if the resolution is forwarded to the President prior to the expiration of the period in which the Senate can reconsider, as in the case before this Court, the President can not be misled. Every resolution sent to the President bears the date of the vote of the Senate. If the vote be one advising and consenting to an appointment, the President thereupon can easily inform himself when the period within which the Senate can reconsider will transpire. The President is further protected by the provision in paragraph 3 of Rule XXXVIII which requires that a motion to reconsider be accompanied by a motion requesting the President to return the resolution previously transmitted to him. When such a motion is made the Secretary of the Senate immediately forwards a copy of it to the President. Hence it is

impossible for the Senate to reconsider a vote on a nomination without notifying the President of its desire to do so.

The Attorney General in his opinion of January 10, 1931, stated that "The rules provide in such case for no second notification, and if the first one be not effective so that the President may rely on it, he never will receive a notification of final consent to the appointment. The President would never be able to rely on any notification and would be obliged to inform himself as best he might as to whether the Senate had finally consented to the appointment."

Obviously the President is not left in so hopeless a position as the Attorney General portrays. We do not dispute that if a notification is sent to the President prior to the expiration of the period within which the Senate can reconsider a vote, the President, as stated by the Attorney General, "would be obliged to inform himself as best he might as to whether the Senate had finally consented to the appointment." We merely add that the established legislative and executive machinery places such information at all times at the President's ready command.

Under the practice immediately following March 25, 1868, the date of the adoption of the rule directing the Secretary of the Senate not to send a resolution to the President until the expiration of the time limited for making a motion to reconsider or while such a motion is pending unless otherwise ordered, the Senate rarely ordered a report of its vote to be forwarded to the President prior to the expiration of the reconsideration period. Gradually, however, it became more and more customary to order the resolution to be sent before the expiration of the reconsideration period—so much so that recently the practice has been to forward the resolution to the President forthwith in the case of nearly every nomination. From the point of view of the President, therefore, the worst that can be alleged against the operation of the present reconsideration rules is this: whereas the practice of the Senate immediately subsequent to the adoption

of Rule 43 on March 25, 1868, was such as only rarely to suggest to the President the expediency of informing himself whether the reconsideration period had in effect transpired, now, on the other hand, such information is more frequently needed.

Rules XXXVIII and XXXIX Do Not "Ignore Constitutional Restraints or Violate Fundamental Rights."

We return to the first test propounded in *United States* v. *Ballin*. Rule XXXVIII has been interpreted by the Senate as permitting, without any limitation or qualification, a reconsideration of a vote on a nomination within the next two days of actual executive session. In Point I of this brief we have argued that this interpretation of the Senate is the only one possible under the explicit and definite provisions of Rules XXXVIII and XXXIX. We submit that as so interpreted the rule does not even approach the zone within which it might be alleged that constitutional restraints are ignored or fundamental rights violated.

In a letter sent by the President to the Senate on January 10, 1931, the President stated that he could "not admit the power in the Senate to encroach upon the executive functions by removal of a duly appointed executive officer under the guise of reconsideration of his nomination" (R. 6). In the light of the history of the Senate Rules and of the long continued practice between the Senate and the President with respect to the return of resolutions, the President was apparently misinformed as to the nature of the action contemplated by the Senate in reconsidering its vote advising and consenting to the appointment of the appellee. If we are correct in our interpretation of the Standing Rules of the Senate, the action of the Senate did not become final and irrevocable until the possibility of a reconsideration of its vote had passed. Until then there had been no binding confirmation. Accordingly, the statement of the President that the Senate was removing a "duly appointed executive officer" begs the

entire question. By no one is it contended that if the Senate had finally voted to advise and consent to the appointment of the appellee, it could then remove him. Such power the Senate clearly does not possess. *Myers* v. *United States*, 272 U. S. 52.

Only to the uninformed could it appear that the Senate was attempting to remove the appellee from office. The argument to this effect results from the fact that at the time of reconsideration the appellee, as a putative commissioner, had entered, in so far as it was possible for him to do, upon his office and was in fact discharging the duties incumbent upon a member and Chairman of the Federal Power Commission. But obviously it is but superficial reasoning to treat this aspect of the matter as conclusive. In the first place, if the Senate had not finally and ultimately confirmed his appointment he was not yet a "duly appointed executive officer". Nor can this court inquire whether or not the Senate proceeded to the reconsideration of its vote of December 20, 1930, because of any action which the appellee had taken in the attempted discharge of his duties as member and Chairman of the Federal Power Commission. The reasons of the Senate are for the Senate alone. Moreover, it would be quite impossible to state what motivated each and every senator in his vote in support of the motion to reconsider and in favor of the subsequent rejection of the nomination. One may be reasonably certain that all the senators were not motivated alike. But even assuming that all the senators were motivated solely by their disapproval of action taken by the appellee as a member and Chairman of the Federal Power Commission the situation, from the point of view of the legal *power* of the Senate to exercise its reserved right to reconsider, is the same as if the appellee prior to being commissioned and entering upon the discharge of the duties of his office had publicly stated what he intended to do once he did assume the duties of his office.

The contention of the appellee in the Court below "that the Executive, after appointment, could not restore the control

to the Senate without violating and infringing the rights of the appointee" (R. 17), like the statement in the letter of the President of January 10, 1931, begs the entire question. If the appointment was made without the advice and consent of the Senate the appointee has no fixed legal rights.

No argument appears that will support the contention that the Senate in adopting the provisions of Rules XXXVIII and XXXIX exceeded the power vested in it by Article I, Section 5 of the Constitution to "determine the rules of its proceedings."

And manifestly the provisions of these valid rules are binding both on the members of the Senate and on the Executive in his dealings with the Senate.

> *Crawford* v. *Gilchrist*, 64 Fla. 41, 58; 59 So. 963, 969;
>
> *People ex rel. Birch* v. *Mills*, 32 Hun (N. Y.) 459, 460 (1884);
>
> *State* v. *New London Savings Bank*, 79 Conn. 141; 64 Atl. 5 (1906);
>
> *Witherspoon* v. *State ex rel. West*, 138 Miss. 310; 103 So. 134 (1925).

The appellee, in fact, conceded this in his brief in the Court below. At page 8 he states:

> "The Senate, under the constitution, has the power to make rules for the regulation of its business and these rules, if consonant with the constitution, had the force of law."

POINT III.

The signing and delivery of a commission and the taking of an oath by the appellee cannot fortify his position or shield him from ouster.

Before the next succeeding day of executive session had arrived or the time for reconsideration had expired, the appellee had already received a commission, had taken the required oath of office and had entered upon the discharge of the duties of the office of member and Chairman of the Federal Power Commission. These steps, however, vested no rights in him.

As we have seen, the Senate by its rules retained without qualification or limitation the power to reconsider its vote at any time within the next two days of actual executive session. Until the expiration of this period, the power of the Senate to advise and consent to the appointment of the appellee or to refuse to do so was in no sense exhausted. Until that time there was and could be no irrevocable confirmation as required by the Constitution. And once the Senate adopted the motion to reconsider the appointment of the appellee, the vote previously taken by the Senate was automatically nullified and invalidated. Under such circumstances, the lack of a confirmation by the Senate as required by the Constitution could not be cured by any action on the part of the President. These conclusions are well supported by numerous adjudications. Added significance is given to the principles expounded in some of the cases by the lack of aid to be derived from definite rules granting and governing the right to reconsider.

People ex rel. MacMahon v. *Davis*, 284 Ill. 439, 120 N. E. 326; 2 A. L. R. 1650 (1918);

Witherspoon v. *State ex rel. West*, 138 Miss. 310; 103 So. 134 (1925);

Wood v. *Cutter*, 138 Mass. 149 (1884);

Crawford v. *Gilchrist*, 64 Fla. 41, 59 So. 963; 32 Ann. Cas. 916 (1912);
Dust v. *Oakman*, 126 Mich. 717; 86 N. W. 151 (1901).

In his opinion of January 10, 1931, the Attorney General admitted that the legal status of the appellee is not altered by the fact that he has received a commission, taken an oath and entered upon the discharge of his duties unless there has actually been a confirmation by the Senate. The Attorney General there stated:

> "Upon the foregoing facts, the ultimate question in this case is whether the appointments were made with the consent of the Senate. If the appointments were made without that consent, they were ineffective and invalid, but if made with the Senate's consent, the function of the Senate in respect of the appointments is ended."

While the taking of the required oath may be a necessary prerequisite to the appointee's entry on his official duties, it is clear that he cannot by his own act in so doing add anything to the validity of his appointment or cure any antecedent defects in his title to the office. In fact, this principle is implied in the statutory provision requiring an oath of an officer. The oath acquires legal sanction only if the officer has already been duly appointed. See U. S. C. Title 5, Section 16.

In law, the situation before the Court is no different from a case of a resolution confirming a certain nominee sent by mistake by the Secretary of the Senate to the President and followed by the issuance of a commission. In such a case, it would hardly be contended that the appointee had become legally invested with title to the office. The doctrine of apparent authority found in the law of agency would have no application. This supposititious case again would be no different from one in which the President issued a commission to a person whose nomination was by error not even submitted to the Senate for its vote of advice and consent.

The sole question, therefore, is whether the Senate did or did not confirm. If the Senate did not in fact finally and completely confirm the nomination, the constitutional requisite cannot be otherwise implied or supplied.

As has been pointed out, courts have repeatedly declared that so long as a legislative body retains its right to reconsider, its actions cannot be held to be final and complete.

In *People ex rel. MacMahon* v. *Davis, supra,* the relators appealed to the Illinois Supreme Court from a judgment of the lower court dismissing a petition for leave to file an information in the nature of a *quo warranto* to oust the defendants from the offices of the Board of Education and to install the relators in their place. The Supreme Court reversed the decision on the following facts. On June 18, 1917, the Mayor of the City of Chicago submitted to the Council the names of the defendants for appointment as members of the Board of Education. By statute it was provided that the members of the Board should be appointed by the Mayor with the approval of the City Council. At that meeting, a motion to concur in the appointments prevailed. Thereupon, one of the aldermen voting in the affirmative moved to reconsider the vote. The City Council had a definitive rule which provided:

> "A vote or question may be reconsidered at any time during the same meeting or at the first regular meeting held thereafter. A motion for reconsideration having been once made and decided in the negative shall not be renewed, nor shall a vote to reconsider be reconsidered" (p. 444).

A motion was subsequently made to lay the motion to reconsider on the table, which motion prevailed. Thereupon, the Council adjourned to June 22, the time fixed for the next regular meeting. At this subsequent meeting, a motion to take the motion to reconsider from the table prevailed. The question was then put on the motion to concur in the appointments of the defendants and this motion was lost. It should be noted that the defendants, from the day next succeeding the vote of the Council to concur in their appointments, as-

sumed and pretended to perform the duties of the office of members of the Board. The Supreme Court held that the relators were entitled to a writ of *quo warranto* to oust the defendants despite the fact that the defendants had assumed the discharge of the duties and powers of the office prior to the time the City Council voted upon reconsideration not to concur in their appointments.

In an opinion carefully reviewing the authorities the Court stated, at page 446:

> "It is insisted that the council has no power to reconsider an election of officers by it; that the confirmation of an appointment is virtually an election to office; that the same rule applies to confirmations as to elections; and that the weight of judicial authority denies to deliberative assemblies the power to reconsider the election of an officer which it was authorized to make. This is not, however, the case of an election—a choice between two or more candidates. The council does not in any sense choose the appointee. The question before it is the approval of an executive act of the mayor. Its action is discretionary and deliberative. *No good reason is apparent why the council may not establish rules in such cases for the government of its own procedure in arriving at its final judgment,* as well as in other cases. Orderly procedure requires some rules for the proper despatch of business and deliberation in its conduct. The confirmation of executive appointments should be deliberately considered, and the rules applicable to ordinary questions to secure such deliberation may well be applied.
>
> * * * * * * *
>
> The action of the appellees in assuming the offices the next day, while the question of the confirmation of their appointment was pending in the council, and in afterward exercising the powers and duties of the offices, did not have the effect of giving them any title to the offices. *The effect of the motion to reconsider the vote to concur in the appointments was to suspend all actions based upon that vote until the reconsideration was acted upon.* The vote to reconsider at the meeting of June 22 was an annulment of the previous vote, and the subsequent vote

was effectual to disapprove the appointments." (Italics added.)

In *Witherspoon* v. *State ex rel. West, supra,* an information in the nature of a *quo warranto* was brought to try the right of the appellant to the office of commissioner of a levee district. The name of the appellant was submitted by the Governor of Mississippi to the Senate which adopted in a secret executive session held on January 18, 1924, a resolution confirming the appointment of the appellant. At this meeting it was ordered that the ban of secrecy be removed from the executive session but no order was made directing that the Governor be notified of the vote on the appellant's confirmation. On January 23, the appellant was properly commissioned by the Governor. On January 30, the vote by which the resolution confirming the appellant's appointment was adopted was reconsidered by the Senate pursuant to its standing rules. At that meeting the successor Governor withdrew the name of the appellant and sent to the Senate the name of the relator which was properly confirmed by the Senate. On April 5, the relator was commissioned by the successor Governor. The Supreme Court of Mississippi held that the relator was entitled to the office despite the fact that the appellant prior to the reconsideration of his appointment by the Senate had received a commission to the office. In its opinion, the Court stated, at page 322:

> "The contentions of counsel for the appellant in this connection in substance are: (1) An appointment to office is complete when the last act required of the person or body vested with the appointing power has been performed. (2) When the Senate has confirmed an appointment to office, it has performed the last act required of it relative thereto, and it is without power to thereafter revoke its confirmation. Both of these contentions are undoubtedly correct, and to cite authority therefor would be supererogatory.
>
> The question then presented is, Did the Senate confirm the appellant's appointment? Or, to express it differently, *Was the affirmative vote on the resolution confirm-*

ing the appellant's appointment final? For, unless that vote was final, the confirmation remained in fieri, and subject to the control of the Senate.

* * * * * * *

Among the rules of the Senate adopted by it pursuant to the authority conferred on it by this section of the Constitution and in force January 30, 1924, are the following:

'Rule 40. When a question has been once made and carried in the affirmative or negative, it shall be in order for a Senator voting with the prevailing side to move a reconsideration thereof; but, where the yeas and nays have not been had, this restriction shall not prevail; any Senator may make the motion to reconsider.

'Rule 41. No motion to reconsider a vote shall be entertained unless it be made on the same day on which the vote was taken or on the next day on which a quorum is present.

'Rule 43. Nominations approved or rejected by the Senate shall not be returned by the Secretary of the Senate to the Governor or other officer until the expiration of the next executive session, unless it be the last day of the session; or while a motion to reconsider is pending, unless otherwise ordered by the Senate.'

* * * * * * *

Of course, as hereinbefore stated, when the Senate confirms an appointment made by the Governor, it is without power thereafter to revoke the confirmation, but under the rules of the Senate which the Constitution authorized it to adopt no vote on the confirmation of an appointment to office is final, and *consequently there is no such confirmation until a motion to reconsider an affirmative vote thereon has been disposed of adversely or the time for the making thereof has expired without such a motion being made.*" (Italics added.)

The Court in its opinion compared rules of the Senate of the State of Mississippi with paragraphs 3 and 4 of Rule XXXVIII of the Standing Rules of the Senate. The provisions of the rules of the Senate of the State of Mississippi

and of the United States Senate are very similar in substance.

In *Wood* v. *Cutter, supra,* Mr. Justice Holmes, then on the Supreme Judicial Court of Massachusetts, upheld the right of a school committee to reconsider an appointment of a superintendent of schools. In his opinion he stated:

> "It begs the question to say that the board had once definitely voted in pursuance of the instructions of the town meeting, and therefore was functus officio and could not reconsider its vote. *The vote was not definitive if it contained the usual implied condition that it was not reconsidered in accordance with ordinary parliamentary practice,* and it must be taken to have been passed subject to the usual incidents of votes, unless some ground is shown for treating it as an exception to common rules" (Italics added). (p. 150.)

In *Crawford* v. *Gilchrist, supra,* the Governor of the State of Florida, as Governor and as an individual, sought an injunction against the Secretary of State for an order enjoining the Secretary from continuing the publication of a presumed amendment to the State Constitution, and enjoining him from certifying it. The defendant appealed to the Supreme Court for a supersedeas against a temporary injunction granted by the lower court. The appeal was denied.

It appears that the House Joint Resolution proposing the amendment was duly passed by the House and certified to the Senate. On May 24, 1911, the Senate also passed the resolution by the requisite three-fifths vote and spread it upon its journal. It is significant to note, moreover, that the passage of the resolution was certified to the House, that is, the resolution was returned to the House. But on the succeeding day, a member of the Senate, pursuant to its rules adopted under constitutional authority, made a motion to reconsider the vote by which the Senate had passed the House Joint Resolution. This motion to reconsider went over under the rules. On motion agreed to by the Senate, the resolution was recalled from the House and was duly returned by the

House to the Senate. A subsequent motion to table the motion to reconsider was defeated. Later it was agreed to defer the motion to reconsider, subject to call. It does not appear from the Senate Journal that any further action respecting the resolution was taken by the Senate.

The Court in its opinion pointed out that the Constitution mandatorily requires amendments to be

> " 'agreed to by three-fifths of all the members elected to each house' of the Legislature. These requirements clearly contemplate that such amendments shall be agreed to by the *deliberate, final affirmative vote* of the requisite number of the members of each house of the Legislature duly taken at a regular session" (Italics added). (p. 54.)

The Court, in its reasoning, continued, at page 55, as follows:

> "If by an affirmative vote of three-fifths of all the members elected to the Senate a proposed amendment of the constitution is passed, and such vote is allowed by the Senate under 'the rules of its proceedings' to become final, such proposed amendment would then be 'agreed to' within the meaning of the constitution. But when a proposed amendment is 'passed' by the requisite vote in the Senate, such passage is subject to the right to reconsider it under the rules authorized by the constitution, and when such vote is, by the Senate, pursuant to 'the rules of its proceedings', duly determined to be reconsidered, and no provision of the constitution is thereby violated, the mere previous passage of the amendment by the Senate does not make the proposed amendment 'agreed to' within the meaning of the constitution.
>
> A right to reconsider action taken is an attribute of all deliberative bodies, and it is not forbidden to the Legislature by the constitution.
>
> * * * * * * * * *
>
> *A vote adopting a resolution and a vote duly taken to reconsider the vote of adoption, 'like positive and negative quantities in equation, destroy one another, and are as if they were expunged from the journals'.* Jefferson's Manual, Sec. XLIII. See also Ashton v. Rochester, 133 N. Y. 187, 30 N. E. 965, 28 Am. St. Rep. 619. The con-

stitutional mandate is that 'Each house *shall* [italics not added] determine the rules of its proceedings' (p. 57).

* * * * * * * *

As House Joint Resolution No. 222 was passed by the Senate subject to its rule that such passage might be reconsidered, the effect of the affirmative action taken by the Senate pursuant to its rules in declaring, as the result of a vote of 16 yeas and 13 nays, that the motion to reconsider the passage of the joint resolution 'was agreed to', is logically *to nullify and render ineffective the vote by which the joint resolution had passed the Senate;* so that, as a result of such reconsideration, the joint resolution not having been again agreed to, was and remained merely a pending matter in the Senate; and, consequently, the joint resolution was not 'agreed to by three-fifths of all the members elected to each house', within the meaning of that provision of the constitution which is a mandatory essential prerequisite to publication and to submission of the matter to the electors for approval or rejection as an amendment to the constitution" (Italics added). (p. 58.)

The principles enunciated in *Crawford* v. *Gilchrist, supra,* were followed by the Supreme Court of Florida in *State ex rel. West* v. *Butler,* 70 Fla. 102; 69 So. 771 (1915), in which it stated:

> "A right to reconsider action taken is an attribute of all deliberative bodies, and it is not forbidden to the Legislature by the Constitution. When not otherwise provided by law, all deliberative bodies have a right during the session to reconsider action taken as they deem proper and it is the final result only that is to be regarded as the thing done" (p. 120).

In *Dust* v. *Oakman, supra,* the Attorney General on the relation of Dust instituted *quo warranto* proceedings against the respondent to test his title to the office of member of the Board of State Tax Commissioners. It appears that on January 3, 1900, the Governor of the State of Michigan transmitted to the Senate the nomination of the respondent. After the receipt of a favorable report from the committee

to which the nomination had been referred, the Senate voted to advise and consent to the nomination. At the same executive session, however, a motion was made to reconsider the vote, which motion prevailed. The Senate later refused to advise and consent to the appointment of the respondent. The motion to reconsider was made pursuant to a standing rule of the Senate which provided that such a motion could be made on the same day the vote was taken or within the next two days of actual session, provided, however, that no motion should be in order unless the bill, resolution, message, report, amendment or motion upon which the vote was taken was in the possession of the Senate. It will be noted that this rule is very similar to the standing rule of the Senate of the United States as existing prior to April 6, 1867. It is because of this proviso that the Court in its opinion points out that no action based upon the first vote had been taken prior to its reconsideration. Chief Justice Montgomery, in holding that a writ of ouster be granted, stated the crux of the matter as follows:

> "The question recurs whether, where an appointment or concurrence in an appointment is a subject of action by a deliberate body, that body may, by rules of its own, or acting under usual parliamentary rules, cast a vote upon the subject which is subject to reconsideration; for, if such course is permissible, *the appointment is not complete beyond recall until the power to reconsider has been cut off by the lapse of time.*
>
> Fortunately, authorities bearing upon this subject are not wanting, and it only remains to apply them." (Italics added.) (p. 721.)

See also:

State v. *New London Savings Bank,* 79 Conn. 141; 64 Atl. 5 (1906);

Conger v. *Gilmer,* 32 Cal. 75 (Supreme Court, 1867);

Reed v. *School Commission,* 176 Mass. 473; 57 N. E. 961 (1900);

Higgins v. *Curtis*, 39 Kan. 283; 18 Pac. 297 (1888);
State ex rel. Gouldey v. *City Council of Atlantic City*, 63 N. J. L. 537; 42 Atl. 852 (1899);
Stiles v. *City of Lambertville*, 73 N. J. L. 90; 62 Atl. 288 (1905);
Ashton v. *City of Rochester*, 133 N. Y. 187; 30 N. E. 965 (1892);
Commonwealth v. *Allen*, 128 Mass. 308 (1880);
People v. *Shawver*, 30 Wyo. 366; 222 Pac. 11, 23 (1924);
State v. *Foster*, 7 N. J. L. 123 (1823);
Red v. *City Council of Augusta*, 25 Georgia 386 (1857);
Luther S. Cushing, Law and Practice of Legislative Assemblies (Ninth ed. 1899), Sec. 1265.

It is sometimes stated that a legislative body cannot reconsider action taken by it, including the confirmation of an appointment. But from an examination of the decisions so stating, it appears invariably that the legislative body had already taken final action. If such is the case, of course, the appellant does not dispute the soundness of the decisions. We do not believe that counsel for the appellee will assert that the principle expounded in such cases is applicable to the case at bar for here it appears that the Senate under its rules never did take final and complete action on the appointment of the appellee. Cases of this nature are:

State ex rel. Childs v. *Wadhams*, 64 Minn. 318; 67 N. W. 64 (1896);
State ex rel. Whitney v. *Buskirk*, 40 N. J. L. 463 (1878);
In re Fitzgerald, 88 App. Div. 434, 82 N. Y. Supp. 811; Affd. 84 N. Y. Supp. 1125 (1903);
State ex rel. Coogan v. *Barbour*,* 53 Conn. 76; 22 Atl. 686 (1885);

* The court also considered that since the common council in appointing a prosecuting attorney was performing an executive function, it did not possess the right to reconsider.

Haight v. *Love*, 39 N. J. L. 14 (1876);
City of Kankakee v. *Small*, 317 Ill. 55; 147 N. E. 404 (1925);
Board of Education of Boyle County v. *McChesney*, 235 Ky. 692; 32 S. W. (2nd Series) 26 (1930);
State ex rel. Burdick v. *Tyrrell*, 158 Wis. 425; 149 N. W. 280 (1914).

In a few decisions relating to the right of a legislative body to reconsider action previously taken, there are dicta indicating that the right may be trimmed down or lost if notice of the action so taken has gone forward.

Baker v. *Cushman*, 127 Mass. 105 (1879);
Wood v. *Cutter*, *supra*;
State v. *Phillips*, 79 Me. 506; 11 Atl. 274 (1887);
Allen v. *Morton*, 94 Ark. 405; 127 S. W. 450 (1910);
State ex rel. Childs v. *Wadhams*, *supra*.

But in all of these cases it should be noted that the legislative body had no definite and explicit rules delimiting and conditioning the right to reconsider and indicating when its action became final. The Courts were consequently faced with the problem of inferring from the particular circumstances of each case whether the action should be reasonably construed as final and complete. And in making this determination, the Courts were apparently justified in considering as one element tending to show the finality of the action the fact that the legislative body had sent out the result of its action or had published it. That this is the approach of courts in such cases clearly appears from the opinion of the Court of Errors and Appeals of the State of New Jersey in *State ex rel. Whitney* v. *Buskirk*, *supra*, at page 467:

"It is clear that while the matter of acceptance was under consideration by the board of councilmen, it was the right of that body to reconsider its vote, and vote

as often as it saw fit upon the question, up to the time when, by a conclusive vote, accepted as such by itself, a determination was reached. *State* v. *Foster*, 2 Halst. 101; *State* v. *Justice*, 4 Zab. 413; *State, Shreve, pros.* v. *Crosley*, 7 Vroom, 428. *Such final determination may be evinced by a public promulgation of the result*, or by subsequent action inconsistent with the purpose of further review. Here the resignation presented by the mayor's message was voted upon and accepted, and afterward the nomination by the mayor of the defendant to fill the vacancy which would occur by this resignation was taken up by the board and by its deliberate vote confirmed." (Italics added.)

None of these decisions in which there appear dicta as to the sending out of notice of its action or publication thereof violate or impair the principles enunciated by the numerous authorities cited by us. In the case before this Court, the Senate had rules definitely regulating its right to reconsider even after a resolution had gone forward to the President. Such decisions, therefore, are irrelevant.

While the appellee has accordingly never been duly and regularly appointed to the office of member of the Federal Power Commission or duly and regularly designated its Chairman, nevertheless a court of law no doubt would recognize him as an officer *de facto* during his occupation. And all action in the discharge of his duties and powers as such is valid. Nor is this validity disturbed by his ouster at this time.

Hussey v. *Smith*, 99 U. S. 20, 24;
In re Manning, 139 U. S. 504, 506;
Ball v. *United States*, 140 U. S. 118, 129;
McDowell v. *United States*, 159 U. S. 596;
Ex parte Henry Ward, 173 U. S. 452.

But for the case before this Court, these principles do not directly concern us. Suffice it that since the Senate did not finally and irrevocably confirm the nomination of the appellee

as required by the Constitution, he is not in law entitled to office. The receipt of a commission, the taking of an oath and the assumption and discharge of the duties of the office did not vest rights in him or immunize him from ouster.

CONCLUSION.

The judgment of the Supreme Court of the District of Columbia should be reversed and the appellant should be granted a writ of *quo warranto* to oust and exclude the appellee from the office of member and Chairman of the Federal Power Commission.

Respectfully submitted,

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On the Brief:
CHARLES POLETTI.

APPENDIX A.

Dates of Legislative and Executive Sessions of the Senate During the Third Session of Seventy-first Congress.

December	1,	1930.	Senate convened.
	2		Legislative session.
	3		Executive session.
	4		" "
	5-7		Senate not in session.
	8		Executive session.
	9		" "
	10		" "
	11		As in Executive Session.
	12		" " " "
			The Senate adjourned until December 15th.
	15		As in Executive session.
	16		Executive session.
	17		As in Executive Session.
	18		Executive session.
	19		" "
	20		" "
			The Senate adjourned until January 5, 1931.
January	5,	1931	Executive session.
	6		" "
	7		" "
	8		" "
	9		" "
	10		" "
	11	(Sunday)	No session.
	12		Executive session.
	13		" "
	14		As in Executive session.
	15		" " " "
	16		" " " "
	17		" " " "
	18	(Sunday)	No session.
	19		As in Executive session.
	20		" " " "
	21		" " " "
	22		Executive session.
	23		" "
	24		As in Executive session.
	25	(Sunday)	No session.
	26		As in Executive session.
	27		" " " "

	28		Executive session.
	29		As in Executive session.
	30		" " " "
	31		" " " "
February	1, 1931.	(Sunday)	No session.
	2		As in Executive session.
	3		" " " "
	4		Executive session.
	5		" "
	6		" "
	7		As in Executive session.
	8	(Sunday)	No session.
	9		As in Executive session.
	10		" " " "
	11		" " " "
	12		" " " "
	13		" " " "
	14		Executive session.
	15	(Sunday)	No session.
	16		As in Executive session.
	17		" " " "
	18		" " " "
	19		" " " "
	20		Executive session.
	21		" "
	22	(Sunday)	No session.
	23		As in Executive session.
	24		Executive session.
	25		" "
	26		As in Executive session.
	27		Executive session.
	28		" "
March	1, 1931.	(Sunday)	No session.
	2		Executive session.
	3		As in Executive Session.
	4		Legislative session.
			Senate adjourned *sine die*.

FILE COPY

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IN THE

Supreme Court of the United States

No. 694. **October Term, 1931.**

THE UNITED STATES OF AMERICA,
Appellant, (Petitioner),

against

GEORGE OTIS SMITH,
Appellee, (Respondent).

On Certificate From the Court of Appeals of the District of Columbia.

BRIEF FOR APPELLEE.

GEORGE WHARTON PEPPER,
Attorney for Appellee.

ERNEST SCOTT,
On the Brief.

International, 236 Chestnut St., Philadelphia

INDEX.

	PAGE
Opinion Below	1
Jurisdiction	2
Question Presented	3
Statement of the Case	4
Summary of Appellee's Argument	6
Argument on Behalf of Appellee	8
Conclusion	19
Appendix A (Review of the Decisions of State Courts Dealing With Reconsideration by Legislative Bodies)	21
Appendix B (History and Interpretation of the Senate Rules Dealing With Reconsideration)	37
Appendix C (Senate, Departmental and Presidential Practice in the Light of the Reconsideration Rules of the Senate)	53
Chart Showing Development of Senate Rules on Reconsideration from 1790 to date.	

TABLE OF CASES CITED.

(Cases in Heavy Type Are Discussed and Analyzed, the Rest Are Merely Cited.)

PAGE

Achley's Case, 4 Abbott's Practice Reps. N. Y. 35.... 34
Allen v. Morton, 94 Ark. 405, 127 S. W. 450 (1910).... 25
Atchison, etc. R. R. v. U. S., 284 U. S. 248 (1931)....47, 63
Attorney General v. Oakman, 126 Mich. 717, 86 N. W. 151 (1901) 29
Baker v. Cushman, 127 Mass. 105..... 30
Conger v. Gilmer, 32 Calif. 75 (1867).....25, 30
Crawford v. Gilchrist, 64 Florida 41 (1912)..... 31
In re Fitzgerald, 88 App. Div. Rep. N. Y. 434..... 33
Gardner v. Collector, 6 Wallace 499 (1867).....47, 63
Harrington v. Pardee, 1 Calif. App. 278, 82 Pac. 83 (1905) 25
Justices of Jefferson County v. Clark, 1 T. B. Monroe (Kentucky) 82 (1824)..... 25
Lane v. Commonwealth, 103 Pa. 481 (1883)..... 25
Marbury v. Madison, 1 Cranch 137 (1803)...8, 11, 18, 25, 34
People ex rel. McMahon v. Davis, 284 Ill. 439, 120 N. E. 326 (1918) 26, 31
People v. Mills, 32 Hun. 459..... 30
Reed v. School Committee, 176 Mass. 473..... 30
State v. Barbour, 53 Conn. 76, 22 Atl. 686 (1885)..... 24
State v. Foster, 7 N. J. Law 101 (1823)..... 30
State v. Miller, 62 Ohio State 436, 57 N. E. 227 (1900). 24
State v. Phillips, 79 Maine 506, 10 Atl. 447 (1887).... 24

TABLE OF CASES CITED—Continued.

PAGE

State v. Starr, 78 Conn. 638, 63 Atl. 512 (1906) 24
State v. Tyrrell, 158 Wis. 425, 149 N. W. 280 (1914) .. 24
State ex rel. Attorney-General v. Wadhams, 64 Minn. 318, 67 N. W. 64 (1896) 34
U. S. v. Ballin, 144 U. S. 1 (1891) 13
U. S. v. LeBaron, 19 Howard 73 (1856) 25
Whitney v. VanBuskirk, 40 N. J. Law 463 (1878) 30, 35
Witherspoon v. State, 138 Miss. 310, 103 So. 134 (1925) 27, 30, 31
Wood v. Cutter, 138 Mass. 149 (1884) 30, 31

PRESENT SENATE STANDING RULES CITED.

Senate Rule XXXVIII 15, 16, 37, 39, 40, 41, 42, 48
Senate Rule XXXIX 39, 42, 43

SENATE PRECEDENTS CITED.

Adams, Robert B. 67
Ballantine, Arthur A. 69, 70
Barnes, Joseph K. 45, 62
Bean, John W. 59
Bliss, E. Raymond 60
Board of Mediation 64, 66
Clark, John W. 60
Cobb, James A. 57
Colby, J. C. S. 62
Conant, Harry A. 57
Durkee, Joseph H. 57, 60
Fisk, A. C. 45
Frost, Westley 45, 62
Goddard, John H. 45, 62
Grew, Joseph C. 70

TABLE OF CASES CITED—Continued.

PAGE

Heath, H. H. 62
Hill, Isaac ..... 45.
Interstate Commerce Commission 64, 66
Jeffries, Noah L. 59, 61, 62
Knight, Alva A. 60
Kursheedt, Edwin I. 58, 61
Legate, James F. 59, 61
Ligon, Charles R. 57
Marks, Morris 62
McCarthy, Wilson 68
Mellon, Andrew W. 68, 69
Miles, Laban J. 60
Mills, Ogden L. 69, 70
Nourse, George 58, 60
Plimley, William 61
Pollock, Samuel M. 58
Pritchard, George W. 60
Reconstruction Finance Corporation Board 67, 68
Reeves, Thomas H. 58, 61
Scott, Lewis A. 59
Shannon, Peter C. 60
Shumard, Belle C. 60, 61
Strum, Louie W. 65, 66
Tubbs, William H. 58, 60

RECORDS OF SENATORIAL PROCEEDINGS.

Congressional Record, Vol. 74, Part 2 65
Congressional Record, Vol. 74, Part 3 65
Congressional Record, Vol. 74, Part 4 ..... 63, 64
Congressional Record, Vol. 74, Part 7 65
Congressional Record, Vol. 75 64-70
Senate Executive Journal, Vol. 15, Part 2 47-48

IN THE

Supreme Court of the United States.

October Term, 1931.

THE UNITED STATES OF AMERICA,
Appellant, (Petitioner),

against

GEORGE OTIS SMITH,
Appellee, (Respondent).

ON CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

OPINION BELOW.

The case came before the Supreme Court of the District of Columbia on a petition for a writ of *quo warranto* filed in the name of the United States by the United States Attorney for the District of Columbia, pursuant to the Code of the District of Columbia, Title 24, Part III, Section 232 thereof, and an answer thereto filed by the appellee. The parties submitted at the argument for the information of the Court a pamphlet entitled "Senate Precedents." This contained a list of precedents relating to the reconsideration by the Senate of votes confirming or rejecting nominations

after notification to the President of its action. The Supreme Court of the District of Columbia in an opinion filed December 5, 1931, denied the petition (R. 11). The opinion is not yet reported. The pamphlet, Senate Precedents, was filed with the opinion (R. 18).

Prior to the entry of the order following the opinion, the parties, by stipulation, submitted additional information concerning Presidential and Senatorial Practice in cases of reconsideration of nominations. This stipulation, dated December 10, 1931, was entitled "Agreement of Counsel in Regard to Facts Concerning Nomination, Confirmation and the Issuance of Commissions in Specific Cases, as Shown by the Senate Executive Journal, by Records of the Executive Offices of the White House, and in Certain Instances by Departmental Records," and was made a part of the record of the Court below by an order entered December 14, 1931.

JURISDICTION.

On December 22, 1931, the Supreme Court of the District of Columbia entered an order that the petition for a writ of *quo warranto* be denied with costs to be paid by the petitioner (R. 112). On the same day the appellant in open court noted an appeal to the Court of Appeals (R. 112). On December 29, 1931, the appellant filed its assignment of errors (R. 112) and the designation of the record (R. 114).

On January 22, 1932, the record was filed with the Court of Appeals and the case noted for trial at the January Term. At the same time there was filed with the Court of Appeals a stipulation by both counsel that the Clerk of the Court of Appeals, in printing the record transmitted to him by the Supreme Court, should, in lieu of printing separately the pamphlet, Senate Precedents, made a part of the record of

the Supreme Court by the opinion filed therein on December 5, 1931, and the stipulation of counsel made a part of the record by order of the Supreme Court entered on December 14, 1931, print the pamphlet and stipulation as one document in the form to be prepared and submitted upon agreement to the Clerk of the Court of Appeals by both counsel. This compilation appears in the record now before this Court as "Senate, White House and Departmental Precedents" (R. 31-112).

Subsequently, the Court of Appeals, pursuant to Section 239 of the Judicial Code, certified a question to this Court. On February 11 the certificate was signed and filed in the Court of Appeals. On February 12 a certified copy thereof was filed in this Court, and on February 15 a joint motion to bring up the entire record and a joint motion to advance the cause were made before this Court. These motions were granted on February 23 (R. p. 137).

QUESTION PRESENTED.

This is a proceeding for a writ of *quo warranto* to oust and exclude the appellee from the office of member and chairman of the Federal Power Commission on the ground that the Senate of the United States has at no time advised and consented to the appointment of the appellee to said office.

The sole question presented upon this appeal is one of law, namely, is it, or is it not, within the power of the United States Senate, to annul a presidential appointment by rescinding, within two days of actual executive session, its advice and consent to a nomination after, by order of the Senate, notice of that advice and consent has been sent to the President, and after the President, in reliance thereon, has signed the commission of the nominee, and after the

President has declined to comply with the request of the Senate for the return of the notification?

The Supreme Court of the District of Columbia answered this question in the negative, and denied the petition for a writ of *quo warranto*.

STATEMENT OF THE CASE.

On December 3, 1930, the President of the United States transmitted to the Senate the nomination of George Otis Smith to be a member of the Federal Power Commission for a term expiring June 22, 1935. The Senate, on December 20, 1930, in open executive session, and by a vote of 38 to 22, advised and consented to the appointment of the appellee to the office for which he had been nominated. On the same day it was ordered by the Senate that this resolution of confirmation be forwarded forthwith to the President. This order was entered late in the evening of Saturday, December 20th, and was executed by the Secretary of the Senate on the morning of Monday, December 22d. Subsequently and on the same day the President signed and, through the Department of State, delivered to the appellee a commission purporting to appoint him a member of the Federal Power Commission and designating him as chairman thereof. The appellee then on the same date took the oath of office and undertook forthwith to discharge the duties of a commissioner.

On January 5, 1931, which was the next day of actual executive session of the Senate after the date of confirmation, a motion to reconsider was duly made by a Senator who had voted to confirm and also a motion to request the President to return the resolution of confirmation which had

been passed into his possession. Both motions were duly adopted and the President was notified in due course.

The President, on January 10, 1931, informed the Senate by a message in writing that he had theretofore appointed the appellee to the office in question, after receiving formal notice of confirmation, and he therefore refused to accede to the Senate's request.

Thereafter a motion was made and adopted in the Senate directing the Executive Clerk of the Senate to place on the Executive Calendar for the action of the Senate "The name and nomination of the said George Otis Smith." Subsequently, on February 4, 1931, the President *pro tem* of the Senate put to the Senate the question of advice and consent to the appointment of the appellee and a majority of the Senators present voted in the negative. Notification of this action was sent to the President.

On the following day, February 5, 1931, the Senate by resolution requested the District Attorney of the District of Columbia to institute in the Court below proceedings in *quo warranto* under the Code of the District to test the appellee's right to hold his office. The District Attorney complied with the request of the Senate and the proceeding was duly instituted as above set forth.

The facts more fully appear in the certificate which was filed by the Court of Appeals with this Court February 12, 1932. This certificate is set out on pages 123-135 of the Record.

SUMMARY OF APPELLEE'S ARGUMENT.

In view of the decision in *Marbury* v. *Madison*, it is settled that where the President has nominated, the Senate has advised and consented, and a commission has been signed by the President, the appointment is complete and the appointee is entitled to office unless and until properly removed. The only point in the present case left open by that decision is whether the Senate may nullify a presidential appointment by subsequent reconsideration proceedings, after notification of confirmation has been sent to the President and after the commission has been issued to the appointee in reliance upon that notification. The appellee urges that when the Senate acted, and notified the President of its action, the legislative branch necessarily parted with its control over the subject-matter which thereupon passed into the hands of the Executive. This left the Senate without power to reverse its action thereafter unless control of the transaction was restored to it by voluntary action of the President.

A study of the provisions of the Senate rules and the history of their development, as well as the practice thereunder, lends strength to this contention. These rules are in harmony with the settled parliamentary principle that there can be no reconsideration by a legislative body which has parted with control of the subject-matter. They indicate that notification sent to the President under them was intended to be a formal declaration of consent on which reliance might be placed. To construe them otherwise would result in interference with the President in the discharge of his constitutional functions,—would recognize interlocutory or conditional consent by the Senate, and would render the

rules invalid and unconstitutional. The contention of the appellee is that constitutional theory, parliamentary usage, Senate rules, Senate precedents, and considerations of practical procedure, alike, lead to the conclusion in the instant case that when the Senate, in conformity with its own rules, ordered notice of consent to be sent to the President, it once and for all surrendered its control of the matter and its right to reconsideration, and left the Executive free to make a constitutional appointment.

ARGUMENT ON BEHALF OF APPELLEE.

I.

It is at least doubtful whether counsel can make any effective addition to the clear and cogent statement of the appellee's case embodied in the opinion of Justice Peyton Gordon in the Court below. (R. pp. 11-30.)

That opinion is, in outline, as follows:

A. Under *Marbury* v. *Madison* there are three steps in an appointment:

(1) Nomination by the President,

(2) Consent and approval by the Senate, and

(3) Appointment by the President, which is complete as soon as he has signed the commission.

B. When the Senate has finally consented, its decision is irrevocable.

C. If in this case the Senate had not authorized immediate notice to the President of confirmation, the Senate would have retained control of approval of the appointment, and in the meantime any appointment by the President would have been illegal.

D. Even where the Senate parts with control, it may, before the President appoints, regain control if the President acquiesces in the Senate's request for a return of the notification.

E. If the Senate in any case approves and loses control of the matter and the President appoints, he likewise

by the act of appointment loses control and cannot disturb the appointee except by removal.

F. It is not the practice of the Senate to return to the President the papers received from him, but simply to send him a notice of its action confirming or refusing to confirm.

G. The advice and consent of the Senate to a nomination, as contemplated by the Constitution, is not a provisional or a conditional one.

H. The general parliamentary rule is that, as stated in Jefferson's Manual, there can be no reconsideration by the Senate after it has parted with control.

I. There have been no substantial changes in the Senate rules on this subject since 1790.

J. The Senate's own construction of its rules has been that, when it has parted with control, its powers are gone unless it regains control with the consent of the President.

K. Constitutional theory, parliamentary usage, Senate rules, Senate precedents, and considerations of practical procedure, alike, lead to the conclusion in the instant case that when the Senate, in conformity with its own rules, ordered notice of consent to be sent to the President, it once and for all surrendered its control of the matter and its right to reconsideration, and left the Executive free to make a constitutional appointment.

We do not understand that the first six of the above propositions (A, B, C, D, E and F) are seriously questioned. We believe that the Court's propositions G, H, I, and J are undoubtedly and clearly sound. Since these prop-

ositions are valid, the conclusion stated in proposition K inevitably follows.

II.

The appellant's brief is devoted to a consideration of

(a) the history of the Senate rules,

(b) the Senatorial practice,

(c) the Executive practice, and

(d) decisions of courts in some of the States.

We venture to devote little space in this brief to these points because

(a) the history of the Senate rules serves only to confirm Judge Gordon's construction of them; (See *infra* pp. 38-51).

(b) the Senate practice could in any event do no more than throw light on the Senate's understanding of its own rules, but in fact merely confirms Judge Gordon's interpretation; (See *infra* at pp. 52-71).

(c) the Executive practice is irrelevant to the appellee's legal rights and, in any event, has not been uniform and consistent, but has depended in any given case upon whether the then Executive was influenced more by regard for the appointee's rights or by the desirability of pleasing the Senate; and

(d) most of the decisions relied upon by the appellant were based upon facts in no wise like those of the present case and are clearly not in point; some of them support our view; others (which at first glance seem divergent) on close analysis appear not to be so; and none of the state decisions are authorities of much weight in a case arising

under the Constitution of the United States (See *infra* pp. 22-36).

Some comment on each of the above points will be found in the Appendices to this brief at the pages above indicated.

III.

While the case is of great and far-reaching importance, this brief is short because there are only a few propositions which are really controlling, and their inherent strength is such that they would gain little by great elaboration. The appellee is content to rest his case upon them.

IV.

1. It has never been doubted since *Marbury* v. *Madison*, 1 Cranch 137 (1803), and is conceded now, that where the President has nominated under the Constitution, the Senate has advised and consented to the appointment, and a commission has been signed by the President, the appointment is complete and the appointee is entitled to office unless and until properly removed.

2. The only point in the present case left open by that decision is whether such an appointment becomes void where the Senate, having first ordered immediate notification to the President of its approval and consent, thereafter reconsiders and undertakes to reverse its action.

In that case, Chief Justice Marshall, speaking for the Court said in effect, that the President could not have changed his mind after signing the commission, because, as he held, the President could not thereafter lawfully have forbidden the Secretary of State to deliver the commission (page 171 of opinion). Can the Senate be per-

mitted, as between itself and the President, to change its mind in a way not permitted to the President as between himself and his appointee?

In an attempt to meet the difficulty presented by this question the appellant is driven to argue that the Senate in this case never really consented—that what it did was to give a mere interlocutory consent, which never became final because, within the period for reconsideration permitted by its own rules, the Senate reversed its consent. According to this view it is unimportant whether the President was or was not in fact ignorant of the Senate rules. Whether he knew it or not, the notice of confirmation immediately sent to him was merely for his comfort—to give him the satisfaction of knowing that so far the Senate was sympathetic.

As against any such theory it is submitted that the Senate had consented, that formal notification gave finality to the consent; and that when the President, having received such official notification and in reliance thereon, had made the appointment, the appointee was legally entitled to office until removed according to law.

3. The appellee insists that the proposition last above stated is not only consistent with the provisions of the Senate rules but necessarily follows from a reasonable interpretation of them. In other words, the Senate has not by its rules attempted to embarrass the President or to impede the discharge of his executive duties. For the moment, however, let it be assumed that the Senate has actually attempted by its rules to impose upon the Executive a period of inaction following receipt by him of notice of confirmation, the duration of the period of inaction being determined solely by the pleasure of the Senate as ex-

pressed in its rule. It is earnestly contended by the appellee that it is beyond the power of the Senate thus to control the conduct of the Executive. To concede such a power to a single House, or even to both Houses acting together, is to assign to their rules the force of a general law passed by both Houses, signed by the President and binding on every citizen. Indeed a concession of such power might even involve the conclusion that a rule of the Senate or House is of greater efficacy than an act of Congress, inasmuch as the latter will not be permitted by this Court to limit the Executive in the discharge of a constitutional function. Let it be assumed, for example, that the Senate rules were silent on the subject of reconsideration but that an act of Congress provided that the President should not, for a six months' period, make an appointment after notice of Senate confirmation and that, within that period, Senate consent might be withdrawn: is it to be supposed that such an act, passed, perhaps, over the President's veto, would be upheld by this Court? Would not that be a clear case of legislative encroachment upon the discharge of a constitutional function by the Executive? Each House under the Constitution may "determine the rules of its proceedings" —but not those of the President or of the Supreme Court. Neither House may "by its rules ignore constitutional restraints or violate fundamental rights and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained." This is the language of Mr. Justice Brewer, speaking for the Court in *U. S.* v. *Ballin* (144 U. S., 1891 at p. 5). It was there decided that the rule of the House of Representatives permitting the Speaker and the clerk to determine by count the presence or absence of

a quorum was a valid exercise of the rule-making power. That decision goes no further than to sustain a reasonable exercise of the power to determine an intra-mural question of legislative procedure, the very case covered by the constitutional grant of power. But to invest Senate rules with a kind of extra-territorial quality is to put it within the power of one branch of Government to regulate the conduct of another by the device of seeming to regulate only its own. The "consent" contemplated by the Constitution is obviously an unconditional consent: no Senate rule can have the effect of annexing to it a clause of defeasance.

In order that the governmental machinery may operate smoothly there must be a specific formality in communicating to each branch the action taken by another, in every case where further official action is intended to follow. The President acts with utmost formality when he notifies the Senate of a nomination. The Senate acts with equal formality when notifying him that he may or may not proceed with the appointment. In neither case should there be mental or other reservations. In each instance it is essential that the notice sent should tell the whole story and that the recipient should be free to act upon it as authentic and decisive. In the instant case all necessary formality was observed. This is the message, sent by special messenger, which the Senate sent and the President received:

"IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES

Saturday, December 20, 1930.

RESOLVED, That the Senate advise and consent to the appointment of the following-named persons to the offices named agreeably to their respective nominations:

FEDERAL POWER COMMISSION

George Otis Smith, to be a member for the term expiring June 22, 1935.

. . . . . .

Attest:

(signed) EDWIN P. THAYER
Secretary."

This is the message which either has the quality and character attributed to it by the appellee or is a purposeless and even a misleading and mischievous communication.

4. When we turn to the Senate rules themselves, they do not furnish a basis for the argument that they were intended to provide for an interlocutory approval and confirmation of the President's nomination. Section 4 of Rule XXXVIII provides that the Secretary shall not notify the President of a confirmation or a rejection of his nomination until the expiration of the time limited for making a motion to reconsider—that is to say, until the next two days of actual executive session after the day of the original consideration shall have expired—*unless otherwise ordered by the Senate.* The Senate intends to retain control of the subject-matter for that period of time *unless it orders otherwise.* In the latter event, of course, its control is gone. Section 3 provides for reconsideration within the period specified, provided that if notice of the confirmation or rejection has been sent to the President, the motion to reconsider must be accompanied by a motion to request the President to return such notification. In short, consistently with section 4, section 3 contemplates that if the Senate has "*ordered*" that the President shall be notified and if he has been notified of the action taken, then it is necessary

that he should return the notification in order that the Senate shall have the right to reconsider—that is to say, shall have regained control of the subject-matter.

The rules recognize the settled parliamentary practice as to parting with control of the transaction; and, as held by the Court below, notice of confirmation sent to the President was intended to be not merely a purposeless gesture, but information on which the Executive might rely.

In the appellant's brief (as for example in the note on p. 30) there is a confusion of thought between *a motion to reconsider* and subsequent reconsideration after the motion is adopted. Of course the *motion* may be entertained even when control has gone; but reversal of former action cannot take place unless control is restored.

It is, of course, not contended by the appellant that the Senate ever in fact called the President's attention to the rule in regard to reconsideration or that there is any such practice as to file with the President notice of changes made in the Senate rules.

The reasonable, as well as the only constitutional interpretation of these rules is that they contemplate that if the Senate parts with control by notification sent to the Presiden, the Senate's power is exhausted unless and until such control is again restored.

5. Furthermore, while a practice could not change the fundamental law (as Mr. Justice Gordon in his opinion in the Court below so clearly shows) the Senate by its own practice and acquiescence, has construed the portion of its rules in question in accordance with our contention. The Senate has never before contended that it had the legal right to *reconsider its approval of a President's nomination after the President had in reliance on such approval ap-*

pointed and had refused to accede to a Senate request for return of control.

6. There are some cases (there is no certainty that there are more than a very few) where the Executive after signing a commission restored control to the Senate at the request of the latter. But the appointee in these cases never asserted his legal rights and all that such instances show is that the then Executive was concerned less with the legal rights of the appointee than with the desirability of conciliating the Senate. Probably in some cases the President never even considered the legal and constitutional phase of the matter. In some cases the Executive refused to restore control and thus protected the appointee, and the Senate acquiesced.

There never was a uniform presidential practice of granting the Senate's request by restoring to the Senate control after the appointment had been made. But even if there had been, such a practice could not affect the appointee's legal rights.

7. It is not necessary to discuss whether unanimous consent is necessary to the abrogation or suspension by the Senate of its own rules. It might be pointed out that there is in substance no difference between a unanimous suspension of the rules followed by a vote to notify the President at once, and simply a unanimous vote to notify the President at once. But the point is that there was no need of unanimous consent to suspension because no suspension of the rules was involved. The rules expressly provide that the Senate may order the immediate sending of notice, and this was done. It is true, and of course the Senate knew, that after sending the notice, the Senate could ask the Presi-

dent to restore the subject-matter to its control, and that, if he were in a position to acquiesce and did acquiesce, they could then reverse their previous action. But where the matter has passed out of the control of the President he has no power to restore such control to the Senate. The only way to get the appointee out of office is by removal. The Senate knew and intended this. The Senate, at the time of directing immediate notice to be sent to the President, was content with the possibility of regaining control if it wanted to change its mind. At the time it had no thought of so doing.

8. It is entirely unnecessary to consider a supposititious case of sharp practice—a case in which the President, having received official notice from the Senate of confirmation of one of his nominations, but having likewise received actual notice that such consent had in the meantime been reversed, immediately signs and causes to be sealed a commission to his appointee and delivers it in order to outwit the Senate. Possibly the result would be different there, but at any rate that is not this case.

9. In conclusion and to sum up what has here been said, the only point left open by the decision in *Marbury* v. *Madison* is this: whether the Senate can annul an appointment after it has directed its officer to send notice of confirmation to the President and after he (in ignorance of a Senate rule reserving the right to reconsider within a certain period or, if knowing of the rule, yet supposing that the Senate, as the rule itself permitted, had voted to forego this period of reconsideration) has relied on the official notice and appointed his nominee to office. It is submitted that the Constitution permits the Senate no such reserved control;

that the rules of the Senate have never contemplated, and the Senate by its own practice has never intimated that it claimed any such reserved control; that even if the rules clearly expressed any such intention, such rules are made only for the regulation of Senate procedure and have not the effect of a law which operates upon all alike whether they know of its terms or not; that no question of the abrogation of the rules of the Senate (by unanimous consent or otherwise) is involved in this case; that the Government could not function if the President were not entitled to rely upon official notice of confirmation of his nomination received from the Senate; and that the appellee was validly appointed to his office under the Constitution and laws of the United States and can be deprived thereof only by removal according to law.

CONCLUSION.

The judgment of the Supreme Court of the District of Columbia should be affirmed and the petition of the appellant for a writ of *quo warranto* to oust and exclude the appellee from the office of member and chairman of the Federal Power Commission should be denied.

Respectfully submitted:

GEORGE WHARTON PEPPER,
Attorney for Appellee.

ERNEST SCOTT,
On the Brief.

APPENDIX A.

Review of the Decisions of State Courts Dealing With Reconsideration by Legislative Bodies.

State decisions support the proposition that the right of a deliberative body to reconsider a vote is lost as soon as control over the subject-matter has passed out of its hands.

APPENDIX A.

The appellant has cited certain decisions of state courts to substantiate its contention that a legislative body may reconsider its vote at any time during the period fixed by its rule and that action cannot be held to be final prior to the expiration of that period. Before considering these cases specifically, it may be well to distinguish between executive and elective appointment.

In the case of an office not filled by popular election, a public official may derive his title to office either from appointment by a single executive or from appointment by the body authorized by law to make it.

If the executive has the power and duty of filling an office, it may be, under applicable law, that the responsibility is wholly his or that his freedom of choice is limited.

In either event, the act of appointment is his alone. In the absence of prescribed formality, any act indicating an executed intention to appoint, done after consent (if requisite) has been obtained, will suffice to confer title to the office. When such an act has been done, the rights of the official become vested. He can thereafter be separated from his office only by death, resignation, expiration of term or lawful removal. If, after valid appointment, the official stands in need of evidence of appointment or of other formal assurance, he is entitled to a mandamus directed to the subordinate officer whose ministerial duty it is to supply the lack.

If title to the office is to be conferred by elective appointment, the electing body under the law may have the whole responsibility of choice or it may be limited by

the requirement that it shall act only upon a nomination or nominations submitted to it by the Executive.

In either case, it is the act of election that confers title. In conducting the election or in reconsidering it, the electing body is governed by rules which are either prescribed by superior authority or are of its own making. It is conceivable that its rules for reconsidering its own action might be so unreasonable that a court would be asked to declare the act of election irrevocable; but in that event the contest would be merely between the electing body and the official. Even in a case in which the election took place upon an executive nomination, the executive would not be directly concerned with the question of reconsideration.

Certain cases have held that where a deliberative body is charged with the duty of making an appointment to public office, the vote of appointment is a completed executive act and not subject to reconsideration.

See *State v. Barbour,* 53 Conn. 76, 22 Atl. 686 (1885);

State v. Starr, 78 Conn. 638, 63 Atl. 512 (1906);

State v. Phillips, 79 Maine 506, 10 Atl. 447 (1887);

State v. Miller, 62 Ohio State 436, 57 N. E. 227 (1900);

State v. Tyrrell, 158 Wis. 425, 149 N. W. 280 (1914).

It is unnecessary to discuss this disputable proposition. The present case is not one in which the appointing power is vested in a collective body, but is one where the appointing power is vested exclusively in the Executive. It seems plain, however, that the rule laid down in the cases above referred to is not applicable to resolutions of consent to a

nomination which is to be followed by executive appointment.

The following cases indicate the source of an appointee's title to office as being either appointive or elective:

Justices of Jefferson County v. Clark, 1 T. B. Monroe (Kentucky) 82 (1824);

U. S. v. LeBaron, 19 Howard 73 (1856);

Conger v. Gilmer, 32 Calif. 75 (1867);

Lane v. Commonwealth, 103 Pa. 481 (1883);

Harrington v. Pardee, 1 Calif. App. 278, 82 Pac. 83 (1905);

Allen v. Morton, 94 Ark. 405, 127 S. W. 450 (1910).

But these need not be here discussed since, under *Marbury* v. *Madison,* 1 Cranch 137, it is plain that officers of the United States derive their title *not from Senatorial election but from Presidential appointment,* and that the Executive, in making the appointment, is not given the whole responsibility of choice but must act with the advice and consent of the Senate.

Five cases cited at some length by the appellant are here analyzed. They are: *People* v. *Davis; Witherspoon* v. *State; Attorney General* v. *Oakman; Wood* v. *Cutter;* and *Crawford* v. *Gilchrist,* all decisions of state courts.

As before stated, the appellant deems these cases authority for the proposition that a legislative body may reconsider its vote during the entire time limited by its rules for reconsideration, regardless of what action it takes in the interim. Appellee views these cases differently and contends that they are merely examples of the general parliamentary rule that reconsideration by a legislative body

may take place as long as it retans possession and control of the subject matter sought to be reconsidered. This general parliamentary rule was early stated in Jefferson's Manual, Sec. XLIII, 2d paragraph, as follows:

> "If, after a vote, the paper on which it is passed has been parted with, there can be no reconsideration; as if a vote has been for the passage of a Bill and the Bill has been sent to the other House."

Then if a motion to reconsider has prevailed but control is not thereafter restored, reconsideration becomes a parliamentary impossibility.

With this well-settled principle in mind, a careful examination of the cases on which the appellant relies will be made:

1. In PEOPLE EX REL. MCMAHON V. DAVIS, 284 Ill. 439, 120 N. E. 326 (1918), the Supreme Court of Illinois dealt with one phase of the subject of reconsideration. The Illinois school law provided for a board of education whose members were "to be appointed by the Mayor with the approval of the City Council." The Mayor accordingly submitted to the Council the names of nine persons for appointment as members of the board of education. A motion to concur in the appointment of these persons was put and carried. Thereupon, and at the same session, a motion to reconsider was made; but this was laid upon the table on the motion of the member who had moved the resolution of concurrence. The Council thereupon adjourned for four days until the date of the next regular session. On reconvening (and after an immaterial skirmish over a proposal to adjourn) a motion was made and carried to take from the table the motion of reconsideration which was lying there. The motion to reconsider was then adopted and when the question of con-

currence in the appointment was again put it was defeated by a decisive vote. Meanwhile the Mayor's nominees had assumed to discharge the duties of board members. The prior incumbents thereupon petitioned for leave to file an information in the nature of *quo warranto* against the nine. An order of leave was afterward vacated and the cause finally came before the Supreme Court on appeal. The Court held that the function of the Council in approving or disapproving the executive act of the Mayor was discretionary and deliberative and that its action might properly be reconsidered in accordance with the rules of the Council. The motion to reconsider had been made at the same session as the motion to concur. The resolution to table had had the effect of keeping the resolution of reconsideration in the possession of the Council awaiting its final action. The final act was the act of the Council. It was not a case in which the Executive had acted upon notice of confirmation. The conduct of the nine respondents in exercising meanwhile the powers and duties of office could give them no title; and for these reasons the judgment appealed from was reversed, three judges dissenting.

2. WITHERSPOON v. STATE, 138 Miss. 310, 103 So. 134 (1925). A *quo warranto* was instituted to determine the title to the office of Commissioner of a Mississippi Levee District. The state constitution vested in the Governor the power to appoint, "subject to the confirmation of the Senate." Witherspoon, the respondent, alleged that he had been appointed to the office in question by Governor Russell, that the Senate had confirmed his appointment and that a commission had subsequently been issued to him by the Governor. West,

the relator, alleged first that the vote of confirmation relied upon by Witherspoon had been reconsidered by the Senate *before* notice of confirmation had been sent to the Governor and within the time allowed for reconsideration by the Senate rules; and, second, that, with the consent of the Senate, Governor Russell's successor had withdrawn Witherspoon's name after this reconsideration, had nominated West to the office and that West's nomination had been duly confirmed. At the trial West introduced in evidence a copy (certified by the Secretary of the Senate) of certain pages of the Senate's executive journal, which supported West's averments as to the absence of any order of notice to the Governor and as to the reconsideration of the resolution consenting to Witherspoon's appointment. Witherspoon introduced in evidence a certificate by the Secretary of State, which disclosed that the Senate's journals filed in his office by the Secretary of the Senate did not show confirmation by the Senate of Witherspoon's nomination. The Trial Court, either because of the evidence that Witherspoon's nomination had not been confirmed, or because satisfied with the evidence that the confirmation, if voted, had been reconsidered and West's nomination confirmed, adjudged West to be entitled to the office. On appeal the Court held that the Trial Court had erred in admitting and acting upon the extracts from the executive journal certified by the Secretary of the Senate and offered by the relator, West, because under the applicable state legislation the exclusive method of ascertaining the contents of the Senate journal was to require production of the original certified by the Secretary of State or a copy thereof as authorized by the State Code. This error necessitated reversal; but, in reversing, the court declined to give final judgment

against the relator, because the Court was of opinion that, upon the facts as alleged by him, it was competent for the Senate to reconsider its vote of confirmation; and therefore remanded the cause to give him an opportunity to correct the technical defect in his proof. The Court disposed of Witherspoon's contention that, in the absence of competent evidence to support the relator's title, there was a presumption of the validity of Witherspoon's commission, by pointing out that the evidence introduced by the latter tended to show that his own nomination had never been confirmed and that therefore the Governor's commission was void. Justice Ethridge (dissenting in part) agreed that the evidence had been improperly received, doubted whether the record could ever be corrected to remove the difficulty and inclined to the view that Senatorial consent to appointment, once given, cannot be reconsidered. The concluding paragraph of his opinion contains some cogent suggestions of the practical evils likely to ensue from any other doctrine. There is nothing in the record or in the majority opinion which even remotely suggests that a right of reconsideration exists after the Senate, by notifying the Executive of consent to appointment, has parted with control of the subject-matter and has thus left the Executive free to act.

3. Attorney General v. Oakman, 126 Mich. 717, 86 N. W. 151 (1901) was a *quo warranto* to determine the title to the office of Tax Commissioner. In this case power to appoint was vested in the Governor by and with the advice and consent of the Senate. The Governor nominated Oakman, a resolution of confirmation was adopted by the Senate and at the same session a motion to reconsider prevailed. It was contended, on behalf of Oakman, that in consenting to his

appointment the Senate had performed an executive and not a legislative duty and that when it had once given its consent it had exhausted its power. The court [citing *Wood* v. *Cutter, infra,* and *State* v. *Foster,* 7 N. J. Law 101 (1823)] held that "where an appointment or concurrence in an appointment is the subject of action by a deliberative body that body may by rules of its own or acting under usual parliamentary rules cast a vote upon the subject which is subject to reconsideration." The Court noted the reaffirmance of *Wood* v. *Cutter,* in *Reed* v. *School Committee,* 176 Mass. 473, and cited also with approval *Whitney* v. *Van Buskirk, infra, Conger* v. *Gilmer, supra, Baker* v. *Cushman,* 127 Mass. 105, and *The People* v. *Mills,* 32 Hun. 459.

These three decisions (*People* v. *Davis, Witherspoon* v. *State, Attorney General* v. *Oakman*) when carefully analyzed, cannot be cited as authority for the principle contended for by the appellant. In the first place, the fundamental distinction exists that they are cases of legislative election rather than executive appointment. The last act required by the body vested with the power of appointment has been done when confirmation, approval or consent is given. This stands in illuminating contrast to the instant case, where the last act required is not the consent of the Senate but the signing of the commission by the President.

In the next place, these cases do not purport to decide the single vital question presented by the case at bar. The most significant factor is missing in each instance. In each case the legislative body vested with the power of approval gave no notice to the appointee or to the Executive that they had advised and consented to the nomination. By failing to give such notice, they in fact signified to the appointees and to the Executive that they intended to keep the matter

in their possession and control for consideration or reconsideration under their own rules. To assume the duties of office in the face of such a situation as was done by the nominees in the case of *People* v. *Davis*, could not transform a conditional approval into an unconditional consent. Likewise, to commission a nominee before the Senate reconsideration period had expired and without notice from the Senate that it had advised and consented to the appointment, as was done in the case of *Witherspoon* v. *State*, could not vest title in him. This is as far as the above cases go. This much the appellee willingly concedes. It is submitted to the Court that the decisions are not only not inconsistent with the Jeffersonian principle of reconsideration, but directly support that principle.

4. In the case of Wood v. Cutter, 138 Mass. 149 (1884), the fourth authority relied upon by appellant, Holmes, *J.*, speaking for the Court, specifically refused to decide the question at issue in the instant case by observing, at page 150:

> "Whether the Board could have cut down their powers of deliberation by communicating their vote before the meeting was closed, or otherwise, is not a question before us."

5. Crawford v. Gilchrist, 64 Florida 41 (1912) is discussed and quoted at length by the appellant. It was a suit by the governor, in his official capacity and as an individual, for the purpose of enjoining the secretary of state from publishing and placing on the ballots a certain proposed amendment to the state constitution. The defendant appealed to the Supreme Court praying a supersedeas against a temporary injunction granted by the lower court. The appeal was denied.

The resolution in dispute was adopted by the House on a three-fifths vote, as required by the constitution. This resolution then came before the Senate and that body likewise approved it by a three-fifths vote. This action was immediately certified to the House. On the succeeding day, a senator who had voted with the majority moved that the resolution be reconsidered and at the same time moved that the resolution be recalled from the House of Representatives. The Senate request for return was duly complied with by the House, and the motion to reconsider was passed by a bare majority vote in the Senate. It was then agreed to defer reconsideration. The record of the Senate Journal did not show that any further action respecting the resolution was taken by the Senate.

The Florida Constitution at the time provided that constitutional amendments must be agreed to by a three-fifths vote of each House. The reconsideration rules of the Senate, in brief, provided that when a vote has been taken, it shall be in order for any member voting in the majority to move a reconsideration thereof on the same or succeeding day (Rule 14), and further provided that the rules of parliamentary practice, comprised in Jefferson's Manual, govern the Senate in all cases to which they are applicable (Rule 34). On this record the Court held (two Justices dissenting on the question of the right of the Governor to bring the action) that the resolution was not "finally agreed to" by the Senate as demanded by the Florida Constitution.

The very statement of the case prevents it from having any force in support of the contention made by the appellant. The Jeffersonian principle of control was expressly made part of the reconsideration rules of the Senate. In direct contrast to the facts of the instant case, the House

did not refuse to return the resolution; on the contrary, control was restored to the Senate when the House complied with the Senate's request for a return of the resolution. In other words, as in the other cases relied upon by the appellant, the Florida Court was not faced with the issue presented in the instant case. It was merely asked to decide two questions (aside from the technical right of the Governor to bring the action) (1) the right of the Senate to reconsider a matter actually restored to its control; (2) the effect of the successful motion to reconsider upon the original vote of approval. The decision of the court on both points, namely, (1) that reconsideration was proper; (2) that it destroyed the original approval, was inevitable under the Jeffersonian principles expressly incorporated into the standing rules of the Senate. Such decision in no way conflicts with the appellee's contention.

. . . . . .

Three state decisions have been found which, from the appellee's point of view, constitute persuasive authority on the question at issue. These cases are:

In re Fitzgerald,
State v. *Wadhams,* and
Whitney v. *Van Buskirk.*

For the convenience of the Court, these decisions will be set out in some detail.

1. Matter of FITZGERALD, 88 Appellate Div. Reports (N. Y.), 434, was decided in 1903. It was a statutory proceeding by Fitzgerald to compel Keenan, acting as Clerk of the City of Olean, to recognize Fitzgerald's claim of title to that office. Keenan had been duly appointed and had qualified to serve for a term of two years or until the ap-

pointment of his successor. The question was whether Fitzgerald had been lawfully appointed to succeed him. The charter of Olean provided that "the Mayor shall nominate and with the consent of the Common Council appoint." On March 2, 1903, the Mayor appointed Fitzgerald and on the same day the Council passed a resolution of consent. Thereafter, on March 9th, Fitzgerald took and filed the oath of office and within the statutory period filed his official bond. On March 20th, at an adjourned meeting of the Council, a resolution was adopted to reject and disapprove such nomination. In determining that Fitzgerald had been validly appointed, the Court observed that the appointment made and confirmed on March 2d was in all respects regular, that he had complied with the statutory requirement respecting the filing of his oath and bond and that the resolution of March 20th was not effective either to invalidate the appointment or to operate as a removal from office. *Marbury* v. *Madison* and *Achley's Case,* 4 Abbott's Practice Reps. N. Y. 35, were cited with approval.

2. STATE EX REL. ATTORNEY-GENERAL v. WADHAMS, 64 Minn. 318, 67 N. W. 64 (1896) was a *quo warranto* to determine title to the office of City Assessor in the City of Duluth. The Mayor was by law authorized, with the advice and consent of the Common Council, to appoint an assessor, the assessor to hold office for a term of two years and until his successor should qualify. On March 12, 1894, the Mayor appointed Wadhams assessor for a term of two years beginning on the first Monday of April in 1894. On March 19, 1894, this appointment was confirmed by the Common Council and Wadhams in due time entered into possession. On March 19, 1896, the Mayor nominated Hawks in the place of

Wadhams and the Council passed a resolution of confirmation. This resolution was presented to the Mayor, who signed and approved it March 24th. This approval and the other proceedings of the City Council were published in the official newspaper on March 27th. On March 30th a motion to reconsider the confirmation of Hawks was adopted. Hawks duly filed an official bond, took the oath of office and demanded possession of the office on the first Monday in April. A judgment of ouster against Wadhams was entered in Hawks's favor. Before the attempted reconsideration "the appointment" said the Court "had been promulgated in addition to being duly declared and entered of record and notice thereof publicly proclaimed." This case (whether it be interpreted as a case of appointment by the Mayor or of elective appointment by the Council) decides that the right of reconsideration is lost where steps have been taken inconsistent with retention of control over the pending matter.

3. STATE EX REL. WHITNEY V. VAN BUSKIRK, 40 N. J. Law 463 (1878). This was a mandamus to determine whether Van Buskirk had title to the office of Chief of Police in the City of Bayonne. Appointment to this office was upon a nomination by the Mayor and a confirmation of his nominee by the Common Council. It appeared that Whitney, the Relator, had held the office and on December 3, 1877, had tendered his resignation thereof to the Mayor and Council, which on the following day both had accepted. It further appeared that the Mayor had then nominated Van Buskirk, his appointment to take effect on the 1st of January and that this nomination had been confirmed by the Council. On the 11th of December the Council reconsidered the vote by which Van Buskirk's nomination was confirmed

and by which Whitney's resignation had been accepted. The Mayor disregarded these proceedings and on December 20th notified Van Buskirk of his appointment and two days later administered the oath of office to him. Van Buskirk entered into possession on the 1st of January against the protest of Whitney. It was held that the right to reconsider the acceptance of Whitney's resignation was ended when the subsequent nomination of Van Buskirk was voted upon and confirmed. "This latter action was entirely inconsistent with the idea that the matter of resignation still remained open for further deliberation."

It will be noted that in all three of these cases the legislative body had no definite rules limiting the right to reconsider.

The appellant contends that this difference gives rise to a fundamental distinction which makes these decisions irrelevant and inapplicable to the case at bar. The appellee does not so understand these cases, but urges that they are pertinent illustrations of the application of the Jeffersonian principle which underlies the present standing rules of the Senate. This principle, restated, is that the right of a legislative body to reconsider ceases when the matter under consideration has passed beyond its control by virtue of an unequivocal act inconsistent with further review.

Appendix B will deal with the development of the standing rules of the Senate in regard to reconsideration, and is designed to demonstrate that under those rules the retention of control by the Senate is essential to its power of reconsideration.

APPENDIX B.

History and Interpretation of the Standing Rules of the Senate Dealing With Reconsideration of Confirmation or Rejection of Nominations.

Rules XXXVIII and XXXIX, when properly construed, mean that when the Senate has ordered notification to be sent to the President and the notice has been sent, its right of reconsideration has gone, unless the President thereafter voluntarily restores control of the transaction to it. The history of the rules supports this interpretation.

APPENDIX B.

The appellant contends that "Rules XXXVIII and XXXIX of the Standing Rules of the Senate by their explicit terms empowered the Senate to entertain a motion, made before the expiration of the next two days of actual executive session, to reconsider its vote advising and consenting to the appointment of the appellee, even though the President had been formally notified of such consent." See Appellant's Brief, page 14.

It is, on the other hand, the contention of the appellee that a study of these rules indicates that *control of the subject-matter* is the significant factor; that when the Senate votes upon a nomination, it has, under its rules, an option to retain control for the next two days of actual executive session or to transmit control to the Executive by ordering that he be notified forthwith. It is conceded that, if the Executive appoints before the Senate has yielded control to him, the appointment is invalid and without effect. It is the further contention of the appellee that, if the Senate elects to notify the President forthwith, control of the transaction is thereby transferred to the Executive, who is thereafter free to make a constitutional appointment. If, within the two-day period, the Senate desires to reconsider its action, a Senator who has voted with the majority may move to reconsider if at the same time a motion is made to request the President to return the notification. If, and only if, the President voluntarily complies with this request for a return, control of the transaction is restored to the Senate, which may thereupon proceed to reconsider within the time allowed by its rules.

In view of this conflict of interpretation of the Senate rules, it is proper that they be set forth in full.

RULE XXXVIII.

EXECUTIVE SESSION—PROCEEDINGS ON NOMINATIONS.

1. When nominations shall be made by the President of the United States to the Senate, they shall, unless otherwise ordered, be referred to appropriate committees; and the final question on every nomination shall be, "Will the Senate advise and consent to this nomination?" which question shall not be put on the same day on which the nomination is received, nor on the day on which it may be reported by a committee, unless by unanimous consent.

2. Hereafter all business in the Senate shall be transacted in open session, unless the Senate in closed session by a majority vote shall determine that a particular nomination, treaty, or other matter shall be considered in closed executive session, in which case all subsequent proceedings with respect to said nomination, treaty, or other matter shall be kept secret: *Provided,* That the injunction of secrecy as to the whole or any part of proceedings in closed executive session may be removed on motion adopted by a majority vote of the Senate in closed executive session: *Provided further,* That Rule XXXV shall apply to open executive sessions: *And provided further,* That any Senator may make public his vote in closed executive session.

Anything in the rules of the Senate inconsistent with the foregoing is hereby repealed.

3. When a nomination is confirmed or rejected, any Senator voting in the majority may move for a reconsideration on the same day on which the vote was taken, or on either of the next two days of actual executive session of the Senate; but if a notification of the confirmation or rejec-

tion of a nomination shall have been sent to the President before the expiration of the time within which a motion to reconsider may be made, the motion to reconsider shall be accompanied by a motion to request the President to return such notification to the Senate. Any motion to reconsider the vote on a nomination may be laid on the table without prejudice to the nomination, and shall be a final disposition of such motion.

4. Nominations confirmed or rejected by the Senate shall not be returned by the Secretary to the President until the expiration of the time limited for making a motion to reconsider the same, or while a motion to reconsider is pending, unless otherwise ordered by the Senate.

5. When the Senate shall adjourn or take a recess for more than thirty days, all motions to reconsider a vote upon a nomination which has been confirmed or rejected by the Senate, which shall be pending at the time of taking such adjournment or recess, shall fall; and the Secretary shall return all such nominations to the President as confirmed or rejected by the Senate, as the case may be.

6. Nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President; and if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President.

RULE XXXIX.

THE PRESIDENT FURNISHED WITH COPIES OF RECORDS OF EXECUTIVE SESSIONS.

The President of the United States shall, from time to time, be furnished with an authenticated transcript of the Executive records of the Senate, but no further extract from the Executive Journal shall be furnished by the Secretary, except by special order of the Senate; and no paper, except original treaties transmitted to the Senate by the President of the United States, and finally acted upon by the Senate, shall be delivered from the office of the Secretary without an order of the Senate for that purpose.

. . . . . .

Paragraphs 3 and 4 of Rule XXXVIII contain the provisions which are important for the purpose of the present discussion. In brief, paragraph 3 (which we shall term the general reconsideration rule) provides that when a nomination is confirmed or rejected, any Senator who voted in the majority may move for a reconsideration within the next two days of actual executive session, but if the notification of confirmation or rejection shall have been sent to the President before the expiration of the time within which a motion to reconsider may be made, the motion to reconsider shall be accompanied by a motion to request the President to return such notification to the Senate. There is no provision in the rule that if the request to restore possession is not complied with, the Senate may nevertheless vote a reconsideration, nor is there any provision in the rule that such course may be taken by the Senate if, after notification, the President has actually appointed and his reply to the Senate so states. Thus it will be seen that this section of the rule prescribes the limits of the period in which a motion

to reconsider may be made, and provides a method for requesting the Executive to restore control.

Paragraph 4 of the same rule covers notification to the President. This paragraph, which we shall call the notification provision, requires that nominations, confirmed or rejected, shall not be returned by the Secretary of the Senate unless one of three things happens:

1. Unless two days of actual executive session have expired without a motion for reconsideration having been made;

2. Unless a pending motion for reconsideration has been disposed of, or

3. *Unless the Senate has otherwise ordered.*

Thus it seems clear that the notification provision reserves to the Senate the right to order the Secretary to return the nomination to the President, confirmed or rejected, before the expiration of the two-day period. Unless this interpretation is given to the rule, the "otherwise ordered" clause is meaningless and futile.

It will be noted that, by the provisions of Rule XXXIX, no paper, except original treaties transmitted to the Senate by the President and finally acted upon by the Senate, shall be delivered from the office of the Secretary without a special order of the Senate. Under this rule the original letter of nomination must remain among the Senate's records. All that the President receives is an authenticated copy of the Senate resolution and it is this document which the President is requested to restore when the Senate asks him to return the notification. The notification to the President and (if he complies with the Senate's request) his return thereof to the Senate are symbolic of the transit of control from one branch of Government to the other.

A chart showing the development of the rules of the United States Senate, relating to reconsideration of confirmation or rejection of nominations, is attached to this brief as part of Appendix B.* An examination of this chart will indicate that all changes in the reconsideration rules, from 1790 down to the present, are not matters of substance but merely matters of detail. Reference to this chart will disclose the exact terminology of each rule in its various stages of evolution.

The first rule was adopted February 25, 1790. It provided:

> "Resolved, That, when a question has been once made and carried in the affirmative or negative, it shall be in order for any member of the majority to move for a reconsideration of it."

In 1806 this resolution, in slightly expanded form, appeared as Rule 21 of the Standing Rules of the Senate. In brief it provided that when a question has been once made and carried, it may be subject to reconsideration within the three next days of actual session of the Senate, provided that no motion for reconsideration shall be in order

> "after a bill, resolution, message, report, amendment, or motion, upon which the vote was taken, shall have gone out of possession of the Senate, nor after the usual message shall have been sent from the Senate, announcing their decision; . . ."

With the exception of immaterial changes, including the cutting down of the reconsideration period from three days of actual session to two days, this rule remained in force until 1867. Under its provisions it was clear that, after

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* *This chart will be found at the end of this brief pasted to the inside of the back cover.*

notification to the President, reconsideration was out of order. The Senate so decided by unanimous vote in 1830 in the case of Isaac Hill (R., p. 34). However, it is significant that, despite this flat decision, the Senate, after notifying the President of its consent, in more than one hundred and sixty instances between 1830 and 1867, entertained a motion to reconsider and requested the Executive to return to it its resolution of consent. The cases of Barnes (R., p. 39), Goddard (R., p. 41), Frost (R., p. 46) and Fisk (R., p. 48) are examples of this practice. When the President voluntarily restored control to the Senate, reconsideration was allowed despite the technicality that under the Senate rule reconsideration was out of order.

The appellant admits this interpretation of the rules up to 1867 and the practice thereunder.

> "Prior to April 6, 1867, the rules were simpler in that, irrespective of the limited period during which the Senate could reconsider, its power to do so was *ipso facto* lost once the resolution had gone out of its possession announcing its decision. In other words, the transmittal of the resolution was made the controlling factor." (Appellant's Brief, p. 29.)
>
> . . . . . .
>
> "In fact, between the time of the decision of the Hill case on April 14, 1930 (typographical error, should be April 14, 1830) and the case of A. C. Fisk on March 28, 1867, the Senate requested the President to return resolutions in no less than 160 cases." (Appellant's Brief, p. 20.)

However, in 1867, says the appellant (p. 51), the Senate adopted new reconsideration rules fundamentally different from the rules in force up to that time, thus making all practice under the former completely immaterial and irrelevant.

The appellee maintains that the amendments then made to the standing rules were not matters of substance but merely matters of detail. The new general reconsideration provision, adopted on April 6, 1867, distinguished between the reconsideration of nominations and the reconsideration of other matters. It specifically excepted the reconsideration of nominations from the provision by which a motion to reconsider was not in order after the Senate had announced its decision. Thus the written rule covering reconsideration of nominations was made to conform to the prior unwritten practice in regard thereto by providing that a motion to reconsider, made after notification to the President, must always be accompanied by a motion to request the President to return the notification. No provision was incorporated into the rule suggesting that the Senate retained the right to reconsider in the event that the President did not comply with its request for a return of control. Furthermore, it was necessary to delete the clause declaring that a motion to reconsider was out of order after notification, so that, in the event the President complied with the request for a return, there would be no doubt as to the technical right of the Senate then to proceed with the desired reconsideration proceedings.

The general reconsideration provision dealing with nominations has retained the form adopted on April 6, 1867, excepting only that the time-limit has subsequently been extended to two days of actual executive session. It is worthy of note that reconsideration of matters other than nominations became, on January 17, 1877, the subject of a separate Standing Rule and has since so remained. It is also worthy of mention that the wording of the reconsider-

ation provisions covering other measures was assimilated to that of nominations at the same time.

Until 1867 the Secretary of the Senate, under a resolution adopted March 27, 1818, had been directed to return all nominations, approved or definitely acted upon by the Senate, to the President from day to day. Thus it will be seen that, although the general reconsideration rule fixed a two or three day period as the time in which a motion to reconsider might be entertained, nevertheless the notification provision trimmed down the actual period in which such a motion would be in order.

On April 3, 1867, Senator Howe proposed an amendment to the notification resolution of March 27, 1818. This resolution read as follows *:

> "RESOLVED that the following be added to the Standing Rules of the Senate:
>
> No resolution of the Senate, confirming or rejecting a nomination, shall be communicated to the President until the time for moving a reconsideration of same shall have transpired." (Senate Executive Journal, Vol. 15, Part 2, p. 631.).

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* *The resolution proposed by Senator Howe on April 3, 1867, will not be found in the record of this case. However, it is well settled that the Supreme Court may take judicial notice of the proceedings of the Senate as they appear in the Senate Executive Journal, where this resolution is recorded in full. See*

Gardner v. *Collector*, 6 Wallace 499 (1867);

Atchison, etc., R. R. v. *U. S.*, 284 U. S. 248 at p. 260 (1931).

This amendment was designed to extend the reconsideration period to two days of actual session of the Senate, as permitted under the general reconsideration rule in force at that time, by relieving the Secretary from the duty to return nominations definitely acted upon to the President from day to day.

On April 5, 1867, the Senator who had proposed this amendment to the resolution of March 27, 1818 (then part of Rule 43),

> "asked and obtained leave to withdraw his resolution of April 3, 1867 proposing an additional Standing Rule." (Senate Executive Journal, Vol. 15, Part 2, p. 644.)

On the very next day after the withdrawal of this resolution, the Senate incorporated the following provision into Rule 43 instead of the suggested amendment:

> ". . . and all nominations approved or definitely acted on by the Senate shall be returned by the Secretary on the next day after such action is had, unless otherwise ordered by the Senate; . . ."

On March 25, 1868, the notification provision of Rule 43 was changed to read as follows:

> "Nominations approved or definitely acted on by the Senate shall not be returned by the Secretary of the Senate to the President until the expiration of the time limited for making a motion to reconsider the same, or while a motion to reconsider is pending, unless otherwise ordered by the Senate. . . ."

This is the present form of Section 4 of Rule XXXVIII.

From this brief survey of the historical development of the rules of the Senate, six facts are clear:

1. That, under the rules in force until 1867, the Senate made a practice of requesting the President to return nominations to it, and, in the event such request was complied with, of reconsidering nominations despite the fact that under its own rule reconsideration was out of order after notification had gone forward to the President, and despite the fact that no provision existed permitting such requests to be made.

2. That in 1867 the written rule was changed to conform with the well-established practice of the Senate.

3. That, under the rules in force before 1867, the Secretary was bound to return nominations definitely acted on to the President from day to day as such proceedings occurred.

4. That the Senate in 1867 considered an amendment to its rules which would prevent the Secretary from returning to the President a nomination definitely acted upon until the two-day period allowed by the reconsideration rule had expired.

5. That this proposed amendment to the rule was withdrawn in favor of an amendment which directed the Secretary to return a nomination definitely acted upon on the next day after such action is had, unless otherwise ordered by the Senate.

6. That within one year thereafter, the notification rule was changed to its present form, by which the Secretary of the Senate is directed not to return nominations definitely acted upon to the President until the expiration of the time limited for making a motion to reconsider, unless otherwise ordered by the Senate.

In brief, a careful examination of the development of the rules leads to the inevitable conclusion that the Senate has reserved for the full time limited by its rules, the right to reconsider a vote but has also reserved the right to dispose of the matter finally before that period has expired.

It is submitted that the foregoing analysis of these rules and their development, constitutes a complete answer to the interpretation placed upon them by the appellant.

The appellee further urges that appellant's construction would render these rules invalid and unconstitutional. Under Article I, Sec. 5 of the Constitution, the Senate is empowered to "determine the rules of its proceedings". It is nowhere empowered to pass rules which do more than regulate its proceedings. If the construction contended for by the appellant should prevail, the Senate rules would unreasonably interfere with the powers of the Executive, encroach upon his functions and hamper him in the proper administration of his constitutional duties. Such interpretation would permit an interlocutory or conditional consent. The Constitution does not recognize or contemplate anything but final advice and consent. Hence the construction urged by the appellant would require that the rules ignore the implied restraints placed upon the rule-making power of the Senate by the Constitution, and would violate the fundamental rights of the Executive in the premises. Furthermore, they would not bear a reasonable relation to the result sought to be attained by the Senate. No useful purpose would be served by the reservation of a right to notify the President concerning a state of mind which might change at any minute and upon which no action could be taken. If the Senate determines to hold open final action on a nomination, it need not order immediate notifi-

cation of its action to the President. The notification provision of the Senate rule clearly would permit the Senate to ponder its action for two days of actual executive session. If it wants to do otherwise than to ponder the matter, it is necessary that the Senate take affirmative action by ordering notification to be sent to the President. The mere fact that in recent years the Senate has ordered that the President be notified forthwith in a large number of instances, is only indicative of the fact that the Senate has of late seldom contemplated the possibility of changing its mind. Nor is such practice indicative of the fact that the Senate has placed no significance on formal notification of its action to the President. In short, if the object of the Senate rules on reconsideration is to give that body a chance either to ponder for a longer period or to act before its expiration, the construction contended for by the appellee provides the only reasonable method to obtain the desired end.

A study of Senate and Presidential practice, as shown by historical precedents, will support the foregoing survey of the Senate rules. Appendix C will set forth such a study.

APPENDIX C.

Senate, Departmental and Presidential Practice in the Light of the Reconsideration Rules of the United States Senate.

In the cases where commissions have been signed by the Executive, there has been no uniform practice in regard to return of resolutions by the President or in regard to reconsideration of nominees by the Senate. The record of recent executive proceedings of the Senate indicates that the Senate intends the President to rely upon notification of confirmation.

APPENDIX C.

The appellant has made the assertion (Appellant's Brief, p. 25) that "the multitudinous instances appearing in the Executive Journal of the Senate since April 6, 1867, in which the Senate requested of the President the return of a resolution, either of confirmation or rejection, and in which the President did in fact return such resolution" are confirmatory of appellant's interpretation of the Senate rules. It is conceded that where before an appointment has been made, the Senate has requested the President to return control of the matter to the Senate the Executive has invariably seen fit to comply with the Senate's request. This the appellee does not seek to controvert; in fact the appellee contends that the President ought in such case voluntarily to restore control of the transaction to the Senate, whereupon the Senate may proceed with the desired reconsideration. It is evident that, in the interest of proper government, such procedure is desirable.

However, the appellant goes further and states (pp. 51, 53) that in eighteen cases the President, after signing the appointee's commission, chose to restore control to the Senate and permit that body to proceed with reconsideration. Before dealing with these cases specifically, it must be stated that the evidence upon which the appellant bases his statements to the effect that the appointees were commissioned by the President prior to a return of the notification to the Senate, is obtained from two sources only:

1. The records of the executive offices of the White House.

2. The records of the Department concerned.

The Executive Journal of the Senate makes no reference to the issuance of commissions, except that some Presidential messages duly recorded therein inform the Senate that commissions had been issued before receipt of request for return. In no instance, however, does the Executive Journal indicate that a President has acquiesced in reconsideration by the Senate after he has issued a commission.

In many instances the interpretation of White House and departmental records depends entirely upon the course of practice pursued in the particular office involved. No one is now alive who can testify concerning this practice during the years 1867 to 1889, which is the period during which these questionable precedents relied upon by the appellant arose. Without proof of such practice these records are of little or no weight.

The appellant, on page 52 of his brief, has undertaken to explain this practice. This explanation is unsatisfactory. It is but a poor substitute for proof. It overlooks the principal factor in the situation. The entry in the records of the executive offices of the White House under the heading "Date of Commission" or "Commissioned" *does not necessarily constitute evidence of the date on which the President signed the commission.* On the contrary, the appellee submits that the entries under these headings indicate the date on the face of the commission but not the date of Presidential signature. The fact that until 1905 the heading under which the entry was made uniformly was "Date of Commission" substantiates appellee's position. Furthermore, reference to the record of this case will show that more often than otherwise the date in the White House Record under "Date of Commission" is the same date as the date of confirmation by the Senate. Thus this date

often antedates even the actual receipt of notice of confirmation by the President. [For examples see cases of Durkee (R. p. 78); Conant (R. p. 79).]

The fact is, as far as the appellee has been able to ascertain it, that the commission is prepared and completed in the appropriate department as soon as notification of the Senate's confirmation has reached it. The preparation of this commission in general involves the completing of the commission in all respects, even including date (very often the confirmation date), but always, of course, excepting the signature of the Executive. Therefore, it is not only possible, but more than likely, that a commission signed by the President on the twentieth of the month may bear a much earlier date than that on which signed. When the record of the commission is entered under the heading "Date of Commission" or "Commissioned" it is again probable, and more than likely, that the date entered will be the date of the filling out of the commission, and not the date of the signing of the commission. For example, the Court is referred to the case of James A. Cobb, appearing on pages 108-109 of the Record. Under the heading "Commissioned" appears the date "3/17/26". Under the heading "Remarks" appears the entry "Commission signed 6/12/26" (Also see Ligon case, R. p. 109). This again indicates that there is no necessary connection between the actual date of signing and the record entry. The implication to the contrary on p. 52 of the appellant's brief is sought to be supported by a statement that the appellant's version "was obtained from officials at the Executive Offices". Nothing in the record justifies this assertion; and (if we are to go outside the record) it is contrary to information given to the appellee at the same source. The

same sources of information were open to both appellant and appellee and were consulted with equal diligence.

In four of the cases relied on by the appellant (Nourse, Tubbs, Reeves and Kursheedt hereafter commented upon), the entries are of such doubtful character that it is wholly unjustifiable to base a flat assertion of fact upon them even if the settled course of practice were undisputed.

Furthermore, it must be borne in mind that the question whether in a particular case a commission has or has not been signed, is material only as between the President and the nominee. That the Senate is interested in nothing except compliance by the President with its request for restoration of control, is evidenced by the fact (already stated) that in no one of the cases wherein control was in fact restored, is there any indication in the Senate Executice Journal that a commission had, or had not, been signed. The most significant fact of all, however, is that in no one of the cases appearing in the records, has there ever been an instance before the present controversy arose, in which the Senate appears to have undertaken to vacate its previous action without a prior voluntary compliance by the President with its request for a return of the control, although in a few cases the Journal fails to record affirmatively the fact of such compliance.

The specific cases relied upon by the appellant will now be commented upon *seriatim*, the comment in each case being addressed to the statement of that case in the appellant's brief.

1. POLLOCK—(R. p. 50): There is no substantial basis for any assertion that in this case a commission was signed before return. It is entirely consistent with the record

that the commission made out in the War Department on April 11th was never actually signed by the President inasmuch as the request for a return had been received by him the day before.

2. JEFFRIES—(R. p. 52): It appears that, upon receipt of a message from the President, in which it was stated that he had acted upon notice of confirmation by the Senate before receiving the Senate's request for a return, the Senate took no further action with respect to this appointment.

3. SCOTT—(R. p. 56): June 7th is entered in the records of the White House under the heading "Date of Commission." It is significant that there is no entry showing a commission issued following the time when confirmation was returned after motion to reconsider had been withdrawn in the Senate. It is suggested for the reasons appearing on pages 56-58 hereof that the entry does not determine the date on which the commission was signed, but merely the date on the face of the commission eventually issued to Scott.

4. BEAN—(R. p. 59): January 17, 1872, appears as a date in the process of commissioning Bean. This however (as explained before) does not necessarily signify the date on which the commission was signed: *i. e.* the date of the executive act. After reconsideration by the Senate, on February 1st, Bean was subsequently reconfirmed.

5. LEGATE—(R. p. 60): Here even if a commission was signed after notice of consent and before request for return, the request for return was voluntarily complied with by the

President and the nomination was withdrawn at the request of the nominee.

6. NOURSE—(R. p. 61): The Court is referred to the history of this case appearing on page 61 of the Record, where an entry will be found to the effect that the commission was "not issued."

7. KNIGHT—(R. p. 64): The date of the commission appears as prior to the date of the return and the nominee was reconfirmed. Therefore, the remarks pertinent to the Scott and Bean cases are applicable here.

8. SHUMARD—(R. p. 64): The White House Record in this case indicates that the President did comply with the Senate's request for return following the issuance of the commission to his nominee since the nominee was never reconfirmed.

9. SHANNON—(R. p. 66), 10. BLISS (R. p. 66) and 11. CLARK (R. p. 68): The same remarks are applicable in these cases as were made concerning the Scott case.

12. TUBBS—(R. p. 76): The entry in the records in the executive offices of the White House, under the heading "Commissioned", appears to have been erased.

13. DURKEE—(R. p. 78): The same remarks made in the Scott case are here applicable since the Senate on July 1, 1879, finally disposed of the matter by laying the motion to reconsider on the table.

14. MILES—(R. p. 83), 15. PRITCHARD (R. p. 84): The same remarks are applicable to these cases as were made in the case of Scott.

16. REEVES—(R. p. 88): The entry in the White House records under the heading "Date of Commission" was scratched out.

17. KURSHEEDT—(R. p. 92): A line is drawn through the entry in the records of the White House under the heading "Date of Commission."

18. PLIMLEY—(R. p. 97): The Treasury Department Record in this case conclusively indicates that the Plimley commission was signed by the President prior to the time he elected to return the resolution of consent to the Senate.

A summary of these cases will indicate that in only four instances can it be asserted with reasonable historical positiveness that the return took place in compliance with the Senate's request after commissions had been signed. These cases are those of Jeffries, Legate, Shumard, and Plimley. In the Jeffries case the return took the form of a message notifying the Senate that an appointment had been made, upon receipt of which the Senate took no further action. An inferior officer was involved in the Shumard case where the President may well have preferred to comply with the Senate's request instead of gratifying the wishes of the nominee. In the Legate case the nomination was withdrawn at the request of the nominee. In the fourth instance, that of William Plimley (the only case which has arisen during the last thirty years) President Roosevelt took the matter into his own hands, extracted a signed commission from the mails, and settled the matter by withdrawing Plimley's nomination on his own motion. In more numerous cases the President has refused to comply with the Senate's request for a return of the notification

after a commission has been issued by him. Instances of such refusal can be found in the cases of Barnes (R. p. 39), Goddard (R. p. 41), Heath (R. p. 44), Frost (R. p. 46), Colby (R. p. 69) and Marks (R. p. 74). In each of these cases the Senate considered an executive reply that the appointee had already been commissioned as sufficient, as likewise it did in the Jeffries case (R. p. 52), even though the President returned the resolution.

From this survey it is evident that there has been no long established practice which gives foundation for the construction which (according to appellant's contention) the Senate has placed upon its rules. On the contrary, it is urged that whatever weight can be given to the foregoing precedents is favorable to the appellee's contention.

It will be recalled that in the instant case confirmation of the appellee was voted on December 20, 1930. On the same day the Senate ordered that the President be notified forthwith. The appellant contends that the formal notification made pursuant to this order constituted no more than a message of sympathy and good cheer. The appellee, in view of this contention, has examined the record of Senate executive proceedings in respect to the confirmation of nominations appearing in the Congressional Record since January 1, 1931. It is urged with confidence that unlike the precedents hereinbefore discussed, this examination throws real light upon the interpretation the Senate has placed upon its rules, because in each case the Record discloses the reason why the Senate preferred to notify the President forthwith instead of awaiting the expiration of the reconsideration period.

The following proceedings* deemed apposite by the appellee are recorded:

(1) 71st Congress—3rd Session.
Congressional Record—Volume 74—Part 4—p. 4044. February 5, 1931.

MR. HEFLIN. Mr. President, a parliamentary inquiry.

The PRESIDENT pro tempore (Mr. Moses). The Senator will state it.

MR. HEFLIN. Just what is the status, then, of an appointee when the Senate confirms him and the President is not notified?

The PRESIDENT pro tempore. It waits until the statutory time for a reconsideration has expired.

MR. HEFLIN. Until two other executive session days have passed?

The PRESIDENT pro tempore. Two executive session days must intervene before a commission can issue.

. . . . . .

(2) 72d Congress—1st Session.
Congressional Record—Volume 75—p. 1003. December 21, 1931.

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* *The proceedings to be referred to will not be found in the record of this case. However, it is well settled that the Supreme Court may take judicial notice of them. See Gardner* v. *Collector*, 6 Wallace 499 (1867); *Atchison etc. R. R.* v. *U. S.*, 284 U. S. 248, at p. 260 (1931).

NOTIFICATION TO THE PRESIDENT.

MR. CO[illegible]ZENS. Mr. President, I am informed that unless we have unanimous consent to notify the President of the confirmation of the nominations to the Interstate Commerce Commission and the Board of Mediation, those gentlemen whose nominations were to-day confirmed cannot hold office until after two executive sessions shall have been held.

The VICE PRESIDENT. The Senator from Michigan is correct.

. . . . . .

From the foregoing it is plain that the Senate knew and understood that if no order of notification was made, the nomination remained within its control during two days of actual executive session, and in the interim the President neither could appoint nor could the nominee hold office.

The Senate, although understanding the practical result which ensued from its failure to order notification to proceed to the President, does not order such notification as a matter of course in all cases. On the contrary, it is important to note that, in a large number of instances, after confirmation no motion was even made that the President be notified. For example, on February 4, 1931, more than 250 nominees were confirmed without an order made to notify the President (Congressional Record, Vol. 74, Part 4, pp. 3938-3939). Likewise, on February 10th and February 17th, 1932, large groups of nominees were confirmed, no effort being made to notify the President. (Congressional Record, Vol. 75, pp. 3782 and 4273). Further, in five instances at least, objection was made when, after confirmation, the Presiding Officer announced that without objection the President would be notified. (See proceedings for January

9th, 1931, Congressional Record, Vol. 74, Part 2, pp. 1748-1749; January 13th, 1931, *id.* p. 2066; January 28th, 1931, Congressional Record, Vol. 74, Part 3, p. 3393; December 22nd, 1931, Congressional Record, Vol. 75, p. 1131; January 11th, 1932, *id.* pp. 1770-71). Thus it will be seen that it is not by any means universal practice to move that the President be notified forthwith, nor is it unusual that, where such a motion is made, its adoption should be blocked by objection.

It remains to refer to the most significant proceedings, all of which have occurred since the litigation in the case at bar was instituted. They are eight in number and are here set out in some detail for the convenience of the Court:

(1) Congressional Record—Volume 74—Part 7.
Pp. 6489-6490. February 28, 1931.

THE JUDICIARY.

The Chief Clerk read the nomination of Louie W. Strum to be United States district judge, southern district of Florida (additional position).

The PRESIDENT pro tempore. Without objection, the nomination is confirmed.

MR. FLETCHER. Mr. President, this judge is very much needed, and has been for some months. He is approved by both Senators from Florida, and was unanimously approved by the subcommittee of the Committee on the Judiciary and by the full Committee on the Judiciary. There is no opposition on record. I ask unanimous consent to waive the rule about two subsequent executive sessions, and that the President be notified with regard to this action.

The PRESIDENT pro tempore. Is there objection to the request of the Senator from Florida that the President be notified of the action taken in the confirmation of Judge Strum? The Chair hears none, and the President will be notified.

. . . . . .

(2) 72d Congress—1st Session.

December 21, 1931, Cong. Rec. p. 1003:

NOTIFICATION TO THE PRESIDENT.

MR. COUZENS. Mr. President, I am informed that unless we have unanimous consent to notify the President of the confirmation of the nominations to the Interstate Commerce Commission and the Board of Mediation, those gentlemen whose nominations were today confirmed cannot hold office until after two executive sessions shall have been held.

The VICE PRESIDENT. The Senator from Michigan is correct.

MR. COUZENS. I ask unanimous consent, then, that the President be notified of those confirmations.

MR. MCNARY. Mr. President, if the Senator will withhold that request just a moment——

MR. COUZENS. Certainly.

MR. MCNARY. I wish to move that all confirmations made on the 17th and 18th and to-day be released and the President be notified. That will cover them all.

The VICE PRESIDENT. Is there objection? The Chair hears none, and it is so ordered. The order includes the confirmations of to-day. The President will be notified.

. . . . . .

(3) December 22, 1931—Cong. Rec. p. 1131.

COAST GUARD.

Robert B. Adams, of Massachusetts, to be engineer in chief for a period of four years, to rank as such from December 18, 1931, a reappointment.

THE VICE PRESIDENT. The question is on confirming the nomination.

The nomination was confirmed.

MR. COPELAND. Mr. President, I ask unanimous consent that the President be notified.

THE VICE PRESIDENT. Is there objection?

MR. NORRIS. Mr. President, I would like to make an inquiry about that. Is there any reason why the President should be notified?

MR. COPELAND. Yes; this man's appointment expired on the 18th of December, and it is very important that he be immediately put on duty.

THE VICE PRESIDENT. Is there objection to the request of the Senator from New York? The Chair hears none, and the President will be notified.

. . . . . .

(4) February 1, 1932—Cong. Rec., p. 3071.

NOTIFICATION TO THE PRESIDENT FOR CONFIRMATIONS.

MR. ROBINSON of Arkansas. Mr. President, inasmuch as the presence of a quorum has just been announced, I desire to ask the attention of the Senate to a matter of some importance.

On Thursday, the last day the Senate was in session, there was a confirmation of three appointees to serve on the Reconstruction Finance Corporation board. It is believed that there is necessity for the

board to function immediately. I therefore ask unanimous consent, as in executive session, that the Secretary be directed to notify the President of the confirmation of the nominations to which I have referred.

The VICE PRESIDENT. Is there objection? The Chair hears none, and the Secretary is authorized to notify the President of the confirmation of the nominations.

. . . . . .

(5) February 3, 1932—Cong. Rec., p. 3415.

The Chief Clerk read the nomination of Wilson McCarthy, of Utah, to be a member of the board of directors of the Reconstruction Finance Corporation for a term of two years from January 22, 1932.

The PRESIDENT pro tempore. Without objection the nomination is confirmed.

MR. KING. Mr. President, the board is now in session and has been for several days, except for Mr. McCarthy, who has not been a member heretofore. In view of the situation and the exigency of the case I ask that the President be notified.

The PRESIDENT pro tempore. Is there objection? The Chair hears none, and the President will be notified.

. . . . . .

(6) February 5, 1932—Cong. Rec., p. 3582.

The VICE PRESIDENT. The question is on confirming the nomination. (Putting the question.) The ayes have it, and the nomination is confirmed.

MR. REED. Mr. President, as is obvious to the Members of the Senate, there is an automatic change taking place in the board of directors of the Recon-

struction Finance Corporation, Mr. Mellon going off the board and Mr. Mills, if he is appointed, taking his place, and the new Under Secretary, whoever he may be, going on as a member ex officio.

I am well aware of the settled policy of the Senate regarding notifying the President in advance of the period available for reconsideration; but for the reasons stated by the Senator from Arkansas (Mr. Robinson) the other day in expediting the notice of the confirmation of members of the board of the Reconstruction Finance Corporation, I ask unanimous consent that the President may now be notified of the confirmation of Mr. Mellon.

The VICE PRESIDENT. Is there objection? The Chair hears none, and the President will be notified that the Senate advises and consents to the nomination.

. . . . . .

(7) On February 10, 1932, when Messrs. Mills and Ballantine were confirmed, objection was made to the immediate notification of the President. (Cong. Rec., p. 3782), but on February 11, 1932 (Cong. Rec., p. 3881), the following proceedings took place:

NOTIFICATION OF THE PRESIDENT.

MR. SMOOT. Mr. President, on yesterday I asked unanimous consent that the President be notified of the advice and consent of the Senate to the nominations of Ogden L. Mills to be Secretary of the Treasury and Arthur A. Ballantine to be Under Secretary of the Treasury. At the time the Senator from Nebraska (Mr. Norris) objected. I have been promised by him that if I would bring up the matter today he would have no further objection to the request. I therefore renew my request that the President be notified of the advice and consent of the Senate to the nominations referred to.

The VICE PRESIDENT. Is there objection?

MR. NORRIS. Mr. President, the Senator from Utah came to see me today about my objection made on yesterday. I understand it is desirable that these gentlemen be installed in their respective offices in order that there may be no interference with a prearranged high-class social function. Of course, I do not want to interfere with anything of that nature, so I withdraw my objection.

The VICE PRESIDENT. Without objection, the President will be notified that the Senate advises and consents to the nominations.

. . . . . .

(8) On February 17, 1932, Mr. Grew was confirmed as Ambassador at Tokio, but no order to notify the President was made. On February 24, 1932, the next day of actual executive session, the following proceedings are recorded (Cong. Rec., p. 4724):

NOTICE OF CONFIRMATION OF AMBASSADOR TO JAPAN.

MR. BORAH. A few days ago the Senate confirmed the nomination of Joseph C. Grew, to be ambassador extraordinary and plenipotentiary to Japan. Since that time we have not had an executive session. I desire to ask, as in executive session, that the President be notified of the confirmation.

The VICE PRESIDENT. In the absence of objection, it will be so ordered, and the President will be notified.

. . . . . .

In the above instances the importance of filling at once the offices in question appears as part of the record. Realizing the exigency of the situation in each cited case, the Senate took uniform action. Such action was taken with the avowed purpose of enabling the President to appoint,

and the appointee to hold office at once. In each case it is obvious that the Senate intended to part with control and leave the Executive free to make an immediate appointment. To effect this purpose the Senate took the very same proceedings that it did in the instant case.

IN EACH CASE, AS IN THE CASE AT BAR, A UNANIMOUS CONSENT ORDER WAS MADE THAT THE SECRETARY OF THE SENATE NOTIFY THE PRESIDENT FORTHWITH, AND IN EACH CASE, AS IN THE CASE AT BAR, AFTER THE ORDER WAS MADE, THE PRESIDING OFFICER OF THE SENATE ANNOUNCED THAT THE PRESIDENT "WILL BE NOTIFIED".

Relying strongly on these precedents, the appellee submits that, when the Senate unanimously ordered that the President be notified concerning the confirmation of the appellee, it intended to part with control over the transaction and leave the President free to make a constitutional appointment without further delay.

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No. 694

In the Supreme Court of the United States

OCTOBER TERM, 1931

UNITED STATES OF AMERICA

v.

GEORGE OTIS SMITH

ON CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIÆ AND TO TAKE PART IN THE ORAL ARGUMENT

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The Attorney General and the Solicitor General move for leave to file a brief *amici curiae* in this cause, and for leave to take part in the oral argument for not more than fifteen minutes.

This is an action in *quo warranto* brought by the United States Attorney for the District of Columbia acting pursuant to instructions from the Attor-

ney General by request of the United States Senate.[1]

Although the action is formally by the United States against George Otis Smith to test the latter's right to his office, the controversy is essentially one between the United States Senate and the President. Accordingly, arguments on behalf of the petitioner, the United States, were presented in the Supreme Court of the District of Columbia by counsel for the United States Senate, and the Attorney General and the Solicitor General, by special leave of court, presented a brief *amici curiæ* on behalf of George Otis Smith.

In this Court, for similar reasons, the United States is represented by counsel employed by the United States Senate and the personal interests of George Otis Smith are represented by his own counsel. Since the right of George Otis Smith to hold his office depends on the power of the Presi-

[1] Senate Resolution 415, 71st Congress, 3d Session, adopted February 5, 1931, reads in part as follows:

"*Resolved*, That the district attorney for the District of Columbia be, and he hereby is, requested to institute proceedings in quo warranto under the code of the said District in the Supreme Court thereof to test the right of George Otis Smith as a member of the Federal Power Commission; that he, the said district attorney, be requested to associate with him counsel for the United States Senate in such proceedings; that the Committee on the Judiciary be, and it hereby is, authorized to engage such counsel, at a cost not to exceed $2,500, who shall, in the event that the requests herein recited are acceded to, assist the said district attorney in such proceedings."

dent under the Constitution, we respectfully move for leave to file a brief *amici curiae* and to take part in the oral argument for not more than fifteen minutes.

WILLIAM D. MITCHELL,
Attorney General.

THOMAS D. THACHER,
Solicitor General.

FEBRUARY, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1932

INDEX

	Page
Statement	1
Question presented	5
Summary of argument	5
Argument	6
Appendix	22

CITATIONS

36 Op. A. G. 382	1
Senate Rules:	
Rule XXXVIII, Par. 3	3
Rule XXXVIII, Par. 4	4
Rule XI	4
Senate Precedents:	
James A. Cobb	12
Walter L. Cohen	12
Charles R. Ligon	12
William Pilmley	12

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GEORGE OTIS SMITH

ON CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF OF AMICI CURIAE

STATEMENT

This proceeding to test the right of the respondent to hold office could only be maintained in the name of the United States and with the consent and on the relation of an official of the Department of Justice. That consent was given out of proper deference for the desire of the Senate to have the case presented for judicial decision. As the officials of the Department of Justice were already committed by an opinion of the Attorney General (36 Ops. Atty. Gen. 382) to a conclusion adverse

to the position taken by the Senate, consent to the institution of this proceeding was given on condition that the Senate would employ its own counsel and that officials of the Department of Justice would not support the petitioner. This explains why officials of the Department appear *amici curiae*.

The respondent, George Otis Smith, was nominated by the President to be a member of the Federal Power Commission, and on December 20, 1930, the Senate considered the nomination and "resolved that the Senate advise and consent to the appointment of the above-named person to the office named agreeably to his said nomination." Thereupon the President pro tempore stated "the Senate advises and consents to the nomination and the President will be notified," which statement met with no objection.

Thereupon and in the usual course an entry was made upon the executive journal of the Senate for December twentieth as follows: "*Ordered,* that the foregoing resolution of confirmation be forwarded to the President of the United States," and on the same day the following order was entered: "*Ordered,* that all resolutions of confirmation this day agreed to be forwarded forthwith to the President of the United States."

On December 22, 1930, an official messenger of the Senate delivered to the President a notification which, in accordance with the established practice,

was a certified copy of the resolution advising and consenting to the appointment. Thereupon, on December 22, 1930, the President signed and delivered a commission to George Otis Smith, purporting to appoint him a member of the Federal Power Commission, and on the same day Smith took the oath of office and entered upon the discharge of his duties. Thereafter and on January 5, 1931, and before the expiration of two executive session days after the passage of the original resolution of December twentieth, the Senate adopted a resolution requesting the President to return to the Senate the resolution consenting to Smith's appointment. This the President declined to do.

Without attempting to restate the case, we may stress certain facts which are of controlling importance.

First. There is a rule of the Senate (Paragraph 3, Rule XXXVIII) providing that when a nomination is confirmed or rejected a motion for reconsideration may be made on the day on which the vote was taken or on either of the next two days of actual executive session of the Senate; but "if a notification of the confirmation or rejection of a nomination shall have been sent to the President before the expiration of the time within which a motion to reconsider may be made, the motion to reconsider shall be accompanied by a motion to request the President to return such notification to the Senate."

Second. Another provision of Rule XXXVIII is (Paragraph 4): "Nominations confirmed or rejected by the Senate shall not be returned by the Secretary to the President until the expiration of the time limited for making a motion to reconsider the same, or while a motion to reconsider is pending, *unless otherwise ordered by the Senate.*" (Italics ours.)

Third. Another rule provides (Rule XL): "Any rule may be suspended without notice by the unanimous consent of the Senate, except as otherwise provided in clause 1, Rule XII." The exception is not material here.

Fourth. The rules expressly recognize that notification of consent to an appointment may be sent to the President by order of the Senate before the expiration of the time allowed by the rules for reconsideration.

Fifth. The rule of the Senate allowing reconsideration within two executive session days may be suspended or abrogated in a particular case by unanimous consent.

Sixth. In this case the Senate by unanimous agreement determined forthwith to notify the President of its consent without waiting for the expiration of the reconsideration period and did so notify him. It is conceded that the action of the Senate amounted to a unanimous agreement to direct its Secretary to give the notification *forthwith* and without waiting for the expiration of the time allowed for reconsideration.

Seventh. The rules and practices of the Senate do not provide for more than one notification or for any second notification where notification is ordered sent to the President before the expiration of two executive session days after confirmation.

QUESTION PRESENTED

The question presented is whether the action of the Senate in this case taken by unanimous consent, forthwith notifying the President that it consented to the appointment, interpreted in the light of all its rules and practices, discloses the intention of the Senate to express to the President its unqualified consent to an immediate appointment and as a decision by the Senate to forego the opportunity to reconsider its action or withdraw its consent or, on the other hand, whether the notification was intended as a preliminary notice of a tentative consent not to be acted on by the President until inaction or further action by the Senate made its consent final.

SUMMARY OF ARGUMENT

By its action the Senate either gave its unconditional consent to immediate appointment or withheld its full and final consent. Either the appointment was valid and beyond the power of the Senate to disturb or it was premature and void. The theory that the Senate gave its consent to an immediate appointment with the qualification that the appointment could be nullified by a reconsideration by the Senate is inadmissable.

The question is one of the intention of the Senate to be ascertained from its action interpreted in the light of its established rules and practices and with the application of a little common sense.

The Senate rules contemplate that the Senate may decide to give its final consent without waiting for the expiration of the two executive session days. The rule allowing reconsideration in that period is subject to suspension by unanimous consent. The decision of the Senate forthwith to notify the President of its consent shows a purpose to allow immediate action by the President. The object of expediting the notification was to expedite the appointment. The Senate's conclusion, by unanimous consent, to notify the President forthwith, amounted to a waiver of the rule allowing later reconsideration, and a decision by the Senate to reach a final conclusion then and there and so advise the President. After that action was taken and notification given, only a change of mind on the part of the Senate and a withdrawal of its consent, communicated to the President before the appointment was made, could have enabled the Senate to prevent the appointment.

ARGUMENT

Three suggestions have been made as to the possible purpose and effect of the Senate's action in sending notification to the President that it consented to the respondent's appointment:

First. That the President was authorized to make an appointment forthwith but subject to its becoming ineffective through reconsideration of the nomination by the Senate;

Second. That the consent so given, of which notification went to the President, was a conditional and qualified consent not representing the final conclusion of the Senate, and therefore the appointment was premature and unauthorized;

Third. That the Senate's action shows unconditional and unqualified consent to an immediate appointment, effective because the Senate did not recant and withdraw its consent, and notify the President of its withdrawal, before appointment was made.

The first position is wholly untenable. The consent required by the Constitution is an unconditional consent to an unconditional appointment.

Either this appointment was valid because made with the unqualified consent of the Senate or it was void. There is no middle ground. Any other view would allow the Senate to encroach upon executive functions by removing an officer after his appointment under the guise of reconsideration of his nomination and because of dissatisfaction with his official acts.

We mention this theory merely because it was suggested in the debates on this case in the Senate. The petitioner does not seem to rely on it, and it seems to be conceded now that the question is

whether the consent was unqualified and the appointment valid, or whether final consent was never given and the appointment was premature and void. Approaching the case this way, there is no constitutional question presented, and we are left merely with the question whether the Senate intended unqualifiedly to consent and so advise the President, and that is to be resolved by considering what the Senate did, in the light of its rules and practices, reasonably construed.

One provision of the rules is that when a nomination is confirmed a motion for reconsideration may be made within either of the next two days of actual executive session. This must be read in connection with Paragraph 4 which provides that a nomination confirmed or rejected shall not be returned by the Secretary to the President until the expiration of the time limited for making a motion to reconsider or while such motion is pending "unless otherwise ordered by the Senate." The rule in paragraph 4 was intended to protect and preserve the power of the Senate to reconsider. It is based on the assumption that if the notification goes to the President before the time allowed by the rule for reconsideration has elapsed and the President makes the appointment, the power to reconsider will be lost. The rules also expressly contemplate that before the time fixed by the rule for reconsideration has expired or even while a motion for reconsideration is pending, the Senate may order an

immediate notification of its consent to the appointment to be transmitted to the President. In this case the Senate resolved that it consented to the appointment and it unanimously resolved that the President be immediately notified that it did consent. Its action in directing that the President be forthwith notified without waiting for the expiration of the time allowed by the rule for reconsideration must have had some purpose. Why order immediate notification to be sent to the President unless he was expected to act upon it? The only conceivable object in expediting the notice was to make it possible for the President to expedite the appointment, and to enable the President immediately to fill the vacancy and to serve the public interest by avoiding delay in the transaction of public business.

No second notice to the President is provided for by Senate rules or practices, and if the one sent be not effective so that the President may rely on it, he never would receive a notification of final consent. The petitioner's position is that before it has consented the Senate may send a notification that it has, and then after it has really consented, it sends no notice. Why do a futile thing—unanimously resolve to notify the President forthwith and rush a special messenger to the executive offices, if the action is not final and the President may not proceed? Why send a formal, expedited notification on which the President can not rely, and then refrain from

giving him a notice of final decision of the Senate and compel him to cause the records of the Senate to be searched to ascertain whether a motion for reconsideration has been made and lost, or two executive sessions have been held without a motion for reconsideration having been made? The fallacy of the petitioner's argument is in the conclusion that the rule allowing reconsideration was an inexorable thing which the Senate itself could not escape from. It involves also the mistaken assumption that the rule which provides for recalling notifications from the President contemplates that in all cases the recall will be in time and successful.

Any rule of the Senate may be suspended in a particular case by unanimous consent. Whether an order of the Senate for immediate notification is in accordance with the rules and requires only a majority vote or amounts to a suspension of the rules requiring unanimous consent is immaterial here. Acting in this case by unanimous consent immediately to notify the President, it did not expressly resolve to refrain from any further consideration and suspend the two executive session day rule, but its action is susceptible of no other interpretation. A decision to notify the President forthwith that it had consented to the appointment necessarily implies that it had decided then to reach a final conclusion.

The precedents indicate that no President has ever questioned the power of the Senate to recon-

sider and withdraw its consent to an appointment if notice of the withdrawal reaches him before the appointment is made.

A discussion of the precedents cited by the petitioner will be left to be made by the respondent, but some points deserve mention.

These precedents tend to support the view that the question that has always been uppermost, and the subject of particular inquiry, has been whether notice of the withdrawal of the Senate's consent reached the President before the appointment was made. We have been unable to find a case in which the Senate actually proceeded to reconsider and reject a nomination once confirmed, where it clearly appears that an appointment had been made by the President before information reached him of the Senate's move to withdraw its consent.

In dealing with these cases, it is evident that those involved did not always have a clear and consistent idea as to what constituted an appointment or whether merely signing a commission effected it.

The cases are also complicated by the fact that the President has the power to remove executive officers, and although an appointment had been made before the Senate undertook to reconsider, he could, by withholding delivery of the commission and thus depriving the appointee of an opportunity to take the oath, followed by nomination and

appointment of another, in effect remove the appointee. Such was the Plimley case. (R. 97.)

In this connection we question the assumption by the petitioner that an entry in the White House records of the "date of commission" or "date commissioned" necessarily means that the commission was signed on the date entered. It may or may not have been. The date so entered is the date the commission bears but not necessarily the date the President signs it. There is evidence of this in the record in this case. See case of James A. Cobb (R. 108–109), where notification was not received until March 18th, the entry under "Commissioned" is March 17th, and the entry under "Remarks" shows the commission was signed June 12th; case of Charles R. Ligon (R. 109), where the receipt for the notification is dated May 6th, the entry under "Commissioned" is May 5th, and the entry under "Remarks" shows the commission was signed May 28th; see also case of Walter L. Cohen (R. 107).

The petitioner's argument is based on the premise that the Senate, though sending the notification, intended to reserve the power to reconsider, and our position is that it did not so intend. If our contention be accepted, questions as to whether the President is presumed to know the rules, or as to whether the President had a right to rely on a notification which was false or premature, or whether the Senate lost jurisdiction by parting with the papers, are eliminated from the case.

The proper conclusion is that by its action in this case the Senate intended to give its unqualified consent to an immediate appointment, and that its action directing notification to be sent forthwith and without waiting for the expiration of the time fixed by the rule for reconsideration, taken by unanimous agreement, amounted to an abrogation in this case of the rules allowing further consideration and discloses the intention of the Senate then and there finally to consent to the appointment and to communicate that consent to the President for immediate action.

The situation is somewhat anomalous in that counsel for the Senate representing the petitioner are here contending for one interpretation of the Senate's rules and action, but the Senate itself since this case arose has repeatedly and without any uncertainty followed a practice consistent only with our position on the law. We need only refer to a few instances disclosed in the Congressional Record, which are set forth in the Appendix. These extracts from the Congressional Record show beyond question that the Senate understands that under its present rules unanimous agreement to notify the President of its consent to an appointment, without waiting for the expiration of the time fixed by the rules for reconsideration, although

without any express mention of the rule about reconsideration, amounts to a decision of the Senate to give unqualified consent to the appointment.

Respectfully submitted.

WILLIAM D. MITCHELL,
Attorney General.
THOMAS D. THACHER,
Solicitor General.
ERWIN N. GRISWOLD,
Attorney.

MARCH, 1932.

APPENDIX

71ST CONGRESS, 3RD SESSION

Congressional Record, Volume 74, Part 7

Pp. 6489–6490, February 28, 1931:

The Chief Clerk read the nomination of Louie W. Strum to be United States district judge, southern district of Florida (additional position).

The PRESIDENT pro tempore. Without objection, the nomination is confirmed.

Mr. FLETCHER. Mr. President, this judge is very much needed, and has been for some months. He is approved by both Senators from Florida, and was unanimously approved by the subcommittee of the Committee on the Judiciary and by the full Committee on the Judiciary. There is no opposition on record. I ask unanimous consent to waive the rule about two subsequent executive sessions, and that the President be notified with regard to this action.

The PRESIDENT pro tempore. Is there objection to the request of the Senator from Florida that the President be notified of the action taken in the confirmation of Judge Strum? The Chair hears none, and the President will be notified.

On January 9, 1931 (Vol. 74, Part 2, pp. 1748–1749), on January 10, 1931 (*Id.*, p. 1937), on January 13, 1931 (*Id.*, p. 2066), and on January 28, 1931 (Vol. 74, Part 3, p. 3393) objection was made when the presiding officer announced that without

objection the President would be notified. In the case of all other confirmations during this session (after January 10, 1931) the announcement of the presiding officer was simply "the nomination is confirmed."

72D CONGRESS, 1ST SESSION

December 21, 1931—Cong. Rec., p. 1003

The following proceedings are recorded:

NOTIFICATION TO THE PRESIDENT

Mr. COUZENS. Mr. President, I am informed that unless we have unanimous consent to notify the President of the confirmation of the nominations to the Interstate Commerce Commission and the Board of Mediation, those gentlemen whose nominations were to-day confirmed can not hold office until after two executive sessions shall have been held.

The VICE PRESIDENT. The Senator from Michigan is correct.

Mr. COUZENS. I ask unanimous consent, then, that the President be notified of those confirmations.

Mr. MCNARY. Mr. President, if the Senator will withhold that request just a moment——

Mr. COUZENS. Certainly.

Mr. MCNARY. I wish to move that all confirmations made on the 17th and 18th and to-day be released and the President be notified. That will cover them all.

The VICE PRESIDENT. Is there objection? The Chair hears none, and it is so ordered. The order includes the confirmations of to-day. The President will be notified.

December 22, 1931—Cong. Rec., p. 1131

The following proceedings are recorded:

COAST GUARD

Robert B. Adams of Massachusetts, to be engineer in chief for a period of four years, to rank as such from December 18, 1931, a reappointment.

The VICE PRESIDENT. The question is on confirming the nomination.

The nomination was confirmed.

Mr. COPELAND. Mr. President, I ask unanimous consent that the President be notified.

The VICE PRESIDENT. Is there objection?

Mr. NORRIS. Mr. President, I would like to make an inquiry about that. Is there any reason why the President should be notified?

Mr. COPELAND. Yes; this man's appointment expired on the 18th of December, and it is very important that he be immediately put on duty.

The VICE PRESIDENT. Is there objection to the request of the Senator from New York? The Chair hears none, and the President will be notified.

FEDERAL POWER COMMISSION

Mr. KENDRICK. Mr. President, at the request of and for the Senator from Michigan [Mr. Couzens], I desire to report from the Committee on Interstate Commerce favorably the nomination of Claude L. Draper, of Wyoming, to be a member of the Federal Power Commission. I ask unanimous consent for the immediate consideration of the nomination.

Mr. KING. Mr. President, will the Senator permit me to ask him a question?

Mr. KENDRICK. Certainly.

Mr. KING. Is the Senator from Montana satisfied?

Mr. KENDRICK. The Senator from Montana has agreed to the confirmation of this nomination.

Mr. SMITH. What was that nomination, Mr. President?

The VICE PRESIDENT. The nomination of Claude L. Draper to be a member of the Federal Power Commission.

Mr. SMITH. That is all right.

The VICE PRESIDENT. Is there objection to the present consideration of the nomination? The Chair hears none, and the nomination is confirmed.

Mr. KENDRICK. Mr. President, I ask unanimous consent that the President be notified.

The VICE PRESIDENT. Is there objection?

Mr. NORRIS. Mr. President, we have had so much difficulty about notifying the President in connection with nominations to the Federal Power Commission that I think we had better let this nomination take its regular course. He will find it out in some way.

The VICE PRESIDENT. Are there further reports of committees? If not, the calendar is in order.

February 1, 1932—Cong. Rec., p. 3071

The following proceedings are recorded:

NOTIFICATION TO THE PRESIDENT FOR CONFIRMATIONS

Mr. ROBINSON of Arkansas. Mr. President, inasmuch as the presence of a quorum has just been announced, I desire to ask the

attention of the Senate to a matter of some importance.

On Thursday, the last day the Senate was in session, there was a confirmation of three appointees to serve on the Reconstruction Finance Corporation board. It is believed that there is necessity for the board to function immediately. I therefore ask unanimous consent, as in executive session, that the Secretary be directed to notify the President of the confirmation of the nominations to which I have referred.

The VICE PRESIDENT. Is there objection? The Chair hears none, and the Secretary is authorized to notify the President of the confirmation of the nominations.

February 3, 1932—Cong. Rec., p. 3415

The following proceedings are recorded:

The Chief Clerk read the nomination of Wilson McCarthy, of Utah, to be a member of the board of directors of the Reconstruction Finance Corporation for a term of two years from January 22, 1932.

The PRESIDENT pro tempore. Without objection, the nomination is confirmed.

Mr. KING. Mr. President, the board is now in session and has been for several days, except for Mr. McCarthy, who has not been a member heretofore. In view of the situation and the exigency of the case I ask that the President be notified.

The PRESIDENT pro tempore. Is there objection? The Chair hears none, and the President will be notified.

Februray 5, 1932—Cong. R., p. 3582

The following proceedings are recorded (confirmation of Mr. Mellon):

> The VICE PRESIDENT. The question is on confirming the nomination. [Putting the question.] The ayes have it, and the nomination is confirmed.
>
> Mr. REED. Mr. President, as is obvious to the Members of the Senate, there is an automatic change taking place in the board of directors of the Reconstruction Finance Corporation, Mr. Mellon going off the board and Mr. Mills, if he is appointed, taking his place, and the new Under Secretary, whoever he may be, going on as a member ex officio.
>
> I am well aware of the settled policy of the Senate regarding notifying the President in advance of the period available for reconsideration, but for the reasons stated by the Senator from Arkansas [Mr. Robinson] the other day, in expediting the notice of the confirmation of members of the board of the Reconstruction Finance Corporation, I ask unanimous consent that the President may now be notified of the confirmation of Mr. Mellon.
>
> The VICE PRESIDENT. Is there objection? The Chair hears none, and the President will be notified that the Senate advises and consents to the nomination.

On February 10, 1932, when Messrs. Mills and Ballantine were confirmed, objection was made to the immediate notification of the President (Cong. Rec., p. 3782), but on February 11, 1932 (Cong. Rec., p. 3881), the following proceedings took place:

NOTIFICATION OF THE PRESIDENT

Mr. SMOOT. Mr. President, on yesterday I asked unanimous consent that the President be notified of the advice and consent of the Senate to the nominations of Ogden L. Mills to be Secretary of the Treasury and Arthur A. Ballantine to be Under Secretary of the Treasury. At the time the Senator from Nebraska [Mr. Norris] objected. I have been promised by him that if I would bring up the matter to-day he would have no further objection to the request. I therefore renew my request that the President be notified of the advice and consent of the Senate to the nominations referred to.

The VICE PRESIDENT. Is there objection?

Mr. NORRIS. Mr. President, the Senator from Utah came to see me to-day about my objection made on yesterday. I understand it is desirable that these gentlemen be installed in their respective offices in order that there may be no interference with a prearranged high-class social function. Of course, I do not want to interfere with anything of that nature, so I withdraw my objection.

The VICE PRESIDENT. Without objection, the President will be notified that the Senate advises and consents to the nominations.

On February 17, 1932, Mr. Grew was confirmed as Ambassador at Tokio, but no order to notify the President was made. On February 24, 1932, the next day of actual executive session, the following proceedings are recorded (Cong. Rec., p. 4724):

NOTICE OF CONFIRMATION OF AMBASSADOR TO JAPAN

Mr. BORAH. A few days ago the Senate confirmed the nomination of Joseph C. Grew, to be ambassador extraordinary and plenipotentiary to Japan. Since that time we have not had an executive session. I desire to ask, as in executive session, that the President be notified of the confirmation.

The VICE PRESIDENT. In the absence of objection, it will be so ordered, and the President will be notified.

U. S. GOVERNMENT PRINTING OFFICE: 19

SUPREME COURT OF THE UNITED STATES.

No. 694.—October Term, 1932.

United States, Appellant, vs. George Otis Smith. } On Certificate from the Court of Appeals of the District of Columbia.

[May 2, 1932.]

Mr. Justice Brandeis delivered the opinion of the Court.

This petition, in the name of the United States, for a writ of *quo warranto* was filed in the Supreme Court of the District of Columbia, on relation of the district attorney, in deference to the desire of the United States Senate to have presented for judicial decision the question whether George Otis Smith holds lawfully the office of member and chairman of the Federal Power Commission. The case was heard upon the petition and answer. On December 22, 1931, the trial court entered judgment denying the petition. An appeal was promptly taken to the Court of Appeals of the District. That court certified a question pursuant to § 239 of the Judicial Code. This Court granted joint motions of the parties to bring up the entire record and to advance the cause.

On December 3, 1930, the President of the United States transmitted to the Senate the nomination of George Otis Smith to be a member of the Federal Power Commission for a term expiring June 22, 1935. On December 20, 1930, the Senate, in open executive session, by a vote of 38 to 22, with 35 Senators not voting, advised and consented to the appointment of Smith to the office for which he had been nominated. On the same day, the Senate ordered that the resolution of confirmation be forwarded to the President.[1] This order was entered late in the evening of

[1]The terms of the resolution were: "*Resolved*, That the Senate advise and consent to the appointment of the above named person to the office named agreeably to his said nomination." Upon the announcement of the vote, the President *pro tempore* stated: "The Senate advises and consents to the nomination and the President will be notified." No objection being made, or

Saturday, December 20th; and still later on the same day the Senate adjourned to January 5, 1931. On Monday, December 22, 1930, the Secretary of the Senate notified the President of the United States of the resolution of confirmation, the communication being delivered by the official messenger of the Senate.[2] Subsequently, and on the same day, the President signed and, through the Department of State, delivered to Smith a commission purporting to appoint him a member of the Federal Power Commission and designating him as chairman thereof. Smith then, on the same day, took the oath of office and undertook forthwith to discharge the duties of a commissioner.

On January 5, 1931, which was the next day of actual executive session of the Senate after the date of confirmation, a motion to reconsider the nomination of Smith was duly made by a Senator who had voted to confirm it, and also a motion to request the President to return the resolution of confirmation which had passed into his possession. Both motions were adopted and the President was notified in due course. On January 10, 1931, the President informed the Senate by a message in writing that he had theretofore appointed Smith to the office in question, after receiving

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further proceedings having been had, in the Senate with reference to said consent or the notification thereof, the following order was entered by the Secretary of the Senate in usual course upon the Executive Journal of the Senate for January 20, 1930: "*Ordered*, that the foregoing resolution of confirmation be forwarded to the President of the United States."

Further action being had in Executive Session on the same day with reference to other nominations, there was entered on the Journal for that day the following order: "*Ordered*, that all resolutions of confirmation this day agreed to be forwarded forthwith to the President of the United States."

[2]The terms of the communication were: "In executive session, Senate of the United States, Saturday, December 20, 1930. *Resolved*, that the Senate advise and consent to the appointment of the following-named persons to the offices named agreeably to their respective nominations:

Federal Power Commission,

George Otis Smith, to be a member for the term expiring June 22, 1935.
Frank R. McNinch, to be a member for the term expiring June 22, 1934.
Marcel Garsaud, to be a member for the term expiring June 22, 1932.

Attest:

(Signed) EDWIN P. THAYER,
Secretary."

formal notice of confirmation, and that, for this reason, he refused to accede to the Senate's request.[3]

Thereafter, a motion was made and adopted in the Senate directing the Executive Clerk to place on the Executive Calendar the "name and nomination of the said George Otis Smith." Subsequently, on February 4, 1931, the President *pro tempore* of the Senate put to the Senate the question of advice and consent to the appointment of Smith, and a majority of the Senators voted in the negative. Notification of this action was sent to the President. On the following day, February 5, 1931, the Senate by resolution requested the district attorney of the District of Columbia to institute in its Supreme Court proceedings in *quo warranto* to test Smith's right to hold office; and, pursuant to that request, this proceeding was filed on May 4, 1931. As the officials of the Department of Justice were committed by an opinion of the Attorney General (36 Ops. Atty. Gen. 382) to a conclusion adverse to the position taken by the Senate, consent to the insti-

[3]The message of the President read as follows:

"*To the Senate of the United States:*

"I am in receipt of the resolution of the Senate dated January 5, 1931—

" 'That the President of the United States be respectfully requested to return to the Senate the resolution advising and consenting to the appointment of George Otis Smith to be a member of the Federal Power Commission, which was agreed to on Saturday, December 20, 1930.'

"I have similar resolutions in respect to the appointment of Messrs. Claude L. Draper and Col. Marcel Garsaud.

"On December 20, 1930, I received the usual attested resolution of the Senate, signed by the Secretary of the Senate, as follows:

"*Resolved,* That the Senate advise and consent to the appointment of the following-named person to the office named agreeably to his nomination:

Federal Power Commission.

George Otis Smith, to be a member of the Federal Power Commission.

"I have similar resolutions in respect to Colonel Garsaud and Mr. Draper.

"I am advised that these appointments were constitutionally made, with the consent of the Senate formally communicated to me, and that the return of the documents by me and reconsideration by the Senate would be ineffective to disturb the appointees in their offices. I cannot admit the power in the Senate to encroach upon the Executive functions by removal of a duly appointed executive officer under the guise of reconsideration of his nomination.

"I regret that I must refuse to accede to the requests.

"HERBERT HOOVER.

"The White House, January 10, 1931."

tution of the proceeding was conditioned upon the Senate's employing its own counsel and upon the understanding that officials of the Department of Justice would not support the petitioner.

No fact is in dispute. The sole question presented is one of law. Did the Senate have the power, on the next day of executive session, to reconsider its vote advising and consenting to the appointment of George Otis Smith, although meanwhile, pursuant to its order, the resolution of consent had been communicated to the President, and thereupon, the commission had issued, Smith had taken the oath of office and had entered upon the discharge of his duties? The answer to this question depends primarily upon the applicable Senate rules. These rules are numbers XXXVIII and XXXIX.[4] The pivotal provisions are paragraphs 3 and 4 of Rule XXXVIII, which read:

"3. When a nomination is confirmed or rejected, any Senator voting in the majority may move for a reconsideration on the same day on which the vote was taken, or on either of the next two days of actual executive session of the Senate; but if a notification of the confirmation or rejection of a nomination shall have been sent to the President before the expiration of the time within which a motion to reconsider may be made, the motion to reconsider shall be accompanied by a motion to request the President to return such notification to the Senate. Any motion to reconsider the vote on a nomination may be laid on the table without prejudice to the nomination, and shall be a final disposition of such motion."

"4. Nominations confirmed or rejected by the Senate shall not be returned by the Secretary to the President until the expiration of the time limited for making a motion to reconsider the same, or while a motion to reconsider is pending, unless otherwise ordered by the Senate."

The contention on behalf of the Senate is that it did not advise and consent to the appointment of George Otis Smith to the office of member of the Federal Power Commission, because, by

[4]Rule XXXIX provides: "The President of the United States shall, from time to time, be furnished with an authenticated transcript of the executive records of the Senate, but no further extract from the Executive Journal shall be furnished by the Secretary, except by special order of the Senate; and no paper except original treaties transmitted to the Senate by the President of the United States, and finally acted upon by the Senate, shall be delivered from the office of the Secretary without an order of the Senate for that purpose." The transcript of executive records relating to action by the Senate on nominations, furnished to the President under this rule, appears to consist only of copies of resolutions of confirmation or rejection.

action duly and regularly taken upon reconsideration in accordance with its Standing Rules, it refused such consent, and gave to the President formal notice of its refusal.

The argument is that the action of the Senate in assenting to the nomination of Smith on December 20, 1930, and ordering that the President be notified, was taken subject to its rules and had only the effect provided for by them; that the rules empowered the Senate, in plain and unambiguous terms, to entertain, at any time prior to the expiration of the next two days of actual executive session, a motion to reconsider its vote advising and consenting to the appointment, although it had previously ordered a copy of the resolution of consent to be forwarded forthwith to the President; that the Senate's action can not be held to be final so long as it retained the right to reconsider; that the Senate did not by its order of notification waive its right to reconsider or intend that the President should forthwith commission Smith; that the rules did not make the right of reconsideration dependent upon compliance by the President with its request that the resolution of consent be returned; that the rules were binding upon the President and all other persons dealing with the Senate in this matter; that as the President was charged with knowledge of the rules, his signing of the commission prior to the expiration of the period within which the Senate might entertain a motion to reconsider had no conclusive legal effect; and that the nominee who had not been legally confirmed could not by his own acts in accepting the commission, taking an oath of office and beginning the discharge of his duties vest himself with any legal rights.

Counsel for the Senate assert that a survey of the historical development of the rules of the Senate relating to reconsideration confirms its present interpretation of the rules; and that the interpretation is further confirmed by the multitudinous instances appearing in the Executive Journal of the Senate in which the President, at the Senate's request, returned resolutions, both of confirmation and of rejection.[5] We are of opinion that the Senate's contention is unsound.

First. The question primarily at issue relates to the construc-

[5]At the argument in the Supreme Court of the District, the parties joined in submitting a pamphlet containing a list of precedents for the reconsideration by the Senate of a vote confirming or rejecting a nomination after notification of the President of its action thereon; and this pamphlet was

tion of the applicable rules, not to their constitutionality. Article I, § 5, Cl. 2, of the Constitution provides that "each house may determine the rules of its proceedings". In *United States* v. *Ballin*, 144 U. S. 1, 5, the Court said: "Neither do the advantages or disadvantages, the wisdom or folly, of . . . a rule present any matters for judicial consideration. With the courts the question is only one of power. The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just." Whether, if the rules of the Senate had in terms reserved power to reconsider a vote of advice and consent under the circumstances here presented, such reservation would be effective as against the President's action, need not be considered here.

As the construction to be given to the rules affects persons other than members of the Senate, the question presented is of necessity a judicial one. Smith asserts that he was duly appointed to office, in the manner prescribed by the Constitution. See *Marbury* v. *Madison*, 1 Cranch. 137, 155, 156. The Senate disputes the claim. In deciding the issue, the Court must give great weight to the Senate's present construction of its own rules; but so far, at least, as that construction was arrived at subsequent to the events in controversy, we are not concluded by it.

Second. Obviously, paragraph 3 of Senate Rule XXXVIII contemplates circumstances under which the Senate may still recon-

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filed with the opinion of that court. Before entry of the order denying the petition, the parties, by stipulation, submitted additional information in regard to facts concerning nomination, confirmation and the issuance of commissions in special cases, as shown by the Senate Executive Journal, by records of the Executive Offices of the White House, and in certain instances by departmental records. The stipulation was made part of the record in the case in the Supreme Court. In accordance with agreement of counsel, both the pamphlet and the stipulation were printed as one document by the Clerk of the Court of Appeals.

Unless otherwise indicated, the references in the succeeding footnotes are drawn from this material.

sider a vote confirming or rejecting a nomination, although notification of its original action has already been sent to the President. Otherwise, the provision for a motion to request the return of a resolution would be meaningless. But paragraph 4 of the same rule contemplates that normally such notification shall be withheld, until the expiration of the time limited for making a motion to reconsider, and if a motion be made, until the disposition thereof; for it declares that notification shall be so withheld "unless otherwise ordered by the Senate." In this case the Senate did so order otherwise; and the question is as to the meaning and effect of this special procedure.

Smith urges that upon receipt of a resolution of advice and consent, final upon its face, the President is authorized to complete the appointment; and that a request to return the resolution can have no effect unless it is received prior to the signing of the commission; that if this were not true the notification would not authorize the President to do anything until the expiration of the reconsideration period, and hence would be futile; or it would purport to authorize him to make an appointment defeasible upon reconsideration and reversal of the Senate's action, and hence would violate a constitutional requirement of unconditional assent. We do not understand counsel for the appellant to urge that an appointment so defeasible may be made, and we have, therefore, no occasion to consider the constitutional objections, advanced on Smith's behalf, to a construction permitting such action. Nor need we consider whether the President might decline to accede to a request to return the Senate's resolution if he received it before making the appointment. The question at issue is whether, under the Senate's rules, an order of notification empowers the President to make a final and indefeasible appointment, if he acts before notice of reconsideration; or whether, despite the notification, he is powerless to complete the appointment until two days of executive session shall have passed without the entry of a motion to reconsider.

Third. The natural meaning of an order of notification to the President is that the Senate consents that the appointment be forthwith completed and that the appointee take office. This is the meaning which, under the rules, a resolution bears when it is sent in normal course after the expiration of the period for reconsideration. Notification before that time is an exceptional procedure,

which may be adopted only by unanimous consent of the Senate.[6] We think it a strained and unnatural construction to say that such extraordinary, expedited notification signifies less than final action, or bears a different meaning than notification sent in normal course pursuant to the rules.

It is essential to the orderly conduct of public business that formality be observed in the relations between different branches of the Government charged with concurrent duties; and that each branch be able to rely upon definite and formal notice of action by another.[7] The construction urged by the Senate would prevent the President from proceeding in any case upon notification of advice and consent, without first determining through unofficial channels whether the resolution had been forwarded in compliance with an order of immediate notification or by the Secretary in the ordinary course of business; for the resolution itself bears only the date of its adoption. If the President determined that the resolution had been sent within the time limited for making a motion to reconsider, he would have then to inform himself when that period expired. If the motion were made, he would be put upon notice of it by receipt of a request to return the resolution. But under the view urged by the Senate, that reconsideration may proceed even though the resolution be not returned, he would receive no formal advice as to the disposition of the motion, save in the case of a final vote of rejection or confirmation.[8] The uncertainty and confusion which would be engendered by such a construction repel its adoption.

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[6]The practice of the Senate seems to be to treat the ordering of immediate notification to the President as, in effect, a suspension of the rules requiring unanimous consent. See, *e. g.*, 74 Cong. Rec., pt. 2, pp. 1748-1749, 1937, 2066; *id.*, pt. 3, p. 3393; Cong. Rec., 72d Cong., 1st Sess., pp. 3782, 3881.

[7]Paragraph (2) of Senate Rule XIII, dealing with reconsideration of measures which have been sent to the House of Representatives, contains a provision for a motion to request the return of a measure similar to that of Rule XXXVIII in respect to nominations. No precedent has been called to the Court's attention indicating that this provision would be construed as permitting the Senate to proceed to a reconsideration, even though the House declined to honor its request.

[8]Thus, the motion to reconsider might be withdrawn, or tabled, or, when put to a vote, might fail, in any of which events the nomination would stand as confirmed, without further notice to the President. If the motion prevailed, the nomination would stand as originally made by the President, but no notice of that fact would reach him unless it were again finally acted upon.

The Senate has offered no adequate explanation of the meaning of an order of immediate notification, if it has not the meaning which Smith contends should be attached to it. Its counsel argues that the practice of ordering such notification developed at a time when the Senate passed upon nominations in closed session; and that the order may have been simply a means of furnishing the President with information, not available through public channels, concerning the probable attitude of the chamber prior to final action. It is suggested that the President might thereby be enabled to muster support for a nominee at first rejected, or to withdraw the nomination before final rejection. But the explanation has no application to a notification of a favorable vote. Nor is it credible that the Senate by unanimous vote would adopt a procedure designed merely to permit the exertion of influence upon a majority to change a decision already made. The construction urged is a labored one. It should not be adopted unless plainly required by the history of the rules and by the meaning which the Senate and the Executive Department in practice have given them.

Fourth. We find nothing in the history of the rules which lends support to the contention of the Senate; and much in their history to the contrary. The present rules relating to the reconsideration of votes confirming or rejecting nominations are substantially those of March 25, 1868. The earlier history is this: Prior to April 6, 1867, no rule had dealt specifically with reconsideration of votes concerning nominations. A resolution adopted February 25, 1790, provided generally that "when a question has been once made and carried in the affirmative or negative, it shall be in order for any member of the majority to move for a reconsideration of it." In 1806, two limitations were attached to this provision: first, that, "no motion for the reconsideration of any vote shall be in order, after a bill, resolution, message, report, amendment, or motion, upon which the vote was taken, shall have gone out of the possession of the Senate, nor after the usual message shall have been sent from the Senate, announcing their decision;" and, second, that no such motion shall be in order "unless made on the same day in which the vote was taken, or within the three next days of actual session of the Senate thereafter."[9] In 1818, a

[9]This rule was altered in 1820 by limiting the time for making a motion to reconsider to two days, and by striking out the words "nor after the usual message shall have been sent from the Senate."

resolution was adopted, "that in future, all nominations approved, or definitively acted on by the Senate, be by the Secretary returned to the President of the United States, from day to day, as such proceedings may occur, any rule or usage to the contrary notwithstanding."

These rules remained in force until 1867.[10] Under them, the Senate decided by unanimous vote in 1830, in the earliest of the precedents cited by the parties, that it was without power to reconsider its rejection of the nomination of Isaac Hill as Second Comptroller of the Treasury, "because the President had been notified." No request appears to have been made in that case for the return of the resolution of rejection. Subsequently, however, it became the practice for the President upon request, to return resolutions of rejection or confirmation, as a matter of comity; and the Senate thereupon reconsidered its action, despite the question under its rules whether reconsideration was in order. Between 1830, the time of Hill's case, and April 5, 1867, about 160 such cases occurred. But several occurring at the close of the period show clearly the limits of the practice. In two cases, the President declined to return the resolution on the ground that the commission had already issued; and the Senate acceded to the refusal.[11] In

[10] In 1792, on January 27, the Senate in executive session ordered, "that the President of the United States be furnished with an authenticated transcript of the executive records of the Senate, from time to time;" and "that no executive business, in future, be published by the Secretary of the Senate." The latter provision remained in force until June 18, 1929, when it was resolved that all such business should be transacted in open session. The former provision is still in force, although modified by subsequent rules. See note 4, *supra*. The first such modification was the resolution of March 27, 1818, mentioned in the text, making special provision for immediate notification of the President concerning action upon nominations. On January 5, 1829, it was "*Resolved*, That no paper, sent to the Senate by the President of the United States, or any executive officer, be returned, or delivered from the office of the Secretary, without an order of the Senate for that purpose."

On February 18, 1843, the Senate adopted the following resolution: "That nominations made by the President to the Senate, and which are neither approved nor rejected during the session at which they are made, shall not be acted upon at any succeeding session without being again made by the President, and that such shall hereafter be the rule of the Senate." This resolution is in substance incorporated in present Rule XXXVIII, paragraph (6).

[11] These were the nominations of John H. Goddard, in 1864, for Justice of the Peace for Washington County, District of Columbia, and of Westley

another, the resolution was returned, but with the statement that a commission had issued; and the Senate appears to have taken no further action.[12] And on April 3, 1867, in the case of A. C. Fisk, the Senate upheld a decision of the chair that a motion to reconsider a vote of confirmation was out of order after the President had been notified, and before the resolution had been returned.

Three days thereafter decisive changes were made in the rules relating both to reconsideration and to notification of the President.[13] On April 6, 1867, the rule concerning reconsideration was modified so as to except specifically motions to reconsider votes upon a nomination from the general prohibition of any such motion where the paper announcing the Senate's decision had gone out of its possession; and the present provision was added, that "a motion to reconsider a vote upon a nomination shall always, if the resolution announcing the decision of the Senate has been sent to the President, be accompanied by a motion requesting the President to

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Frost, in 1867, as Assessor of Internal Revenue for the Twenty-first District of Pennsylvania. In the Goddard case, President Lincoln advised the Senate simply that the resolution was sent to the Department of State prior to receipt of the request for its return, and that "a commission in accordance therewith [was] issued to Mr. Goddard on the same day, the appointment being thus perfected, and the resolution becoming a part of the permanent records of the Department of State." No further proceedings are recorded in the Senate Executive Journal. In the Frost case, after a similar reply, Senator Sherman offered a resolution that "the Secretary of the Treasury be requested to recall the commission . . . and that the President be requested to return to the Senate the action of the Senate in the appointment. . . ." This resolution was rejected by a vote of 14 to 23.

[12]In the case of Joseph K. Barnes, nominated as Medical Inspector General in 1864, President Lincoln returned the resolution of confirmation, but "respectfully called" the attention of the Senate to certain circumstances, including the execution and delivery of a commission before the making of the motion to reconsider. The author of the motion to reconsider asked, and had leave, to withdraw it.

In the case of H. H. Smith, nominated as Secretary of the Territory of New Mexico, in 1867, President Johnson returned the resolution of confirmation, together with a report of the Secretary of State that "the commission was made out and sent to the Executive Mansion for signature, and has not been returned." It is not clear that a commission did, in fact, issue. No further proceedings are recorded in the Journal.

[13]These changes were apparently prompted by certain of the incidents just referred to. The resolution presented by Senator Sherman in the Frost case, *supra*, note 11, was rejected on April 1, 1867. The amended rules were adopted, April 6, 1867, on motion of Senator Fessenden, who had appealed to the Senate from the decision of the chair in the Fisk case.

return the same to the Senate." At the same time, it was provided that "all nominations approved or definitely acted on by the Senate shall be returned by the Secretary on the next day after such action is had, unless otherwise ordered by the Senate."

These changes in the rules not only met the situation which had arisen in Fisk's case, but gave explicit sanction to the long-standing practice of requesting the President to return resolutions upon nominations and thereafter reconsidering them. Counsel for the Senate argue that, in addition, they completely reversed the practice theretofore established in respect to reconsideration after notification of the President; that by divorcing the period for reconsideration from the normal time for notifying the President, they showed an intention that the power to reconsider should be unaffected by the transmittal of notification or by the President's action thereon. In a case occurring shortly after the new rules were adopted, however, the Senate Committee on the Judiciary clearly showed its understanding that no such change had taken place. Noah L. Jeffries was nominated for Register of the Treasury and confirmed and the President was notified. To a subsequent request for the return of the resolution the President replied that a commission had already issued. The Committee on the Judiciary, to which the matter was referred, expressed the opinion that the Senate had power to reconsider its vote, but gave as its reason that the request to return the resolution had in fact been received before the commission was signed.[14]

The basis for the argument drawn from the rules of 1867, however, was clearly destroyed a year later, when the rule for notification was further altered, and given virtually its present form.

[14]The President returned the resolution, with an accompanying report of the Secretary of the Treasury. The report stated "that in the ordinary transaction of business the commission was issued on the 14th instant by the State Department, and was received at this Department on the 15th instant. General Jeffries had legally qualified and entered upon the discharge of the duties of his office prior to the receipt of the Senate resolution of the 14th instant, which, under these circumstances, is herewith returned." The Committee on the Judiciary reported in part as follows: "It . . . appears that before Mr. Jeffries had been qualified or commissioned as required by law precedent to his entering upon the discharge of his functions under his permanent appointment the President of the United States, in whom the sole right of appointment, subject to the approval of the Senate, is vested by the Constitution, had received notice from the Senate that it had not finally acted upon the question of advising and consenting to the nomination, and withdrawing its resolution of assent to that appointment which had been trans-

The new rule, adopted March 25, 1868, provided that "nominations approved or definitely acted on by the Senate shall not be returned by the Secretary of the Senate to the President until the expiration of the time limited for making a motion to reconsider, or while a motion to reconsider is pending, unless otherwise ordered by the Senate." No material changes have since been made, either in this rule or in that respecting reconsideration.[15]

Read in the light of the preceding rules and the practice under them, the meaning of the rules thus established is, in our opinion, free from doubt. Prior to 1867, it had been continuously recog-

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mitted to the President on the same day; and the committee are, therefore, of the opinion that the Senate may now lawfully reconsider its vote advising and consenting to the appointment if it shall see proper cause therefor. In this view of the case a majority of the committee were of opinion that it was inexpedient to enter upon an inquiry as to the matter of fact whether the issuing of the commission in this case and the qualification of the officer in question was hastened for any cause out of the usual course of business." The only evidence concerning the subsequent history of the case is that during the same session, some five months later, Mr. Jeffries was nominated for another office, and rejected.

In the case of Samuel M. Pollock, confirmed as brigadier general by brevet, on April 8, 1867, the President, on April 11, complied with a request to return the resolution sent him on April 10, and the Senate later rejected the nomination. The records of the War Department show April 11, 1867, as the date of a commission to Samuel M. Pollock. The entry is marked in red ink, "Cancelled (rejected by the Senate)." Counsel for Smith, and the Attorney General and Solicitor General in their brief *amici curiae* question whether a commission was in fact issued in this case. See note 19, *infra*.

[15]The phrase "approved or definitely acted on" was changed in 1877 to "confirmed or rejected", and as so changed the rule still stands as paragraph 4 of Rule XXXVIII. The rule on reconsideration was also given its present wording in 1877, when the material affecting nominations was taken out of the general provision relating to reconsideration in Rule 20 and placed in a separate rule. The only changes of substance were the extension of the period for reconsideration to two days of "actual executive session", and the addition of the sentence: "Any motion to reconsider the vote on a nomination may be laid on the table without prejudice to the nomination, and shall be a final disposition of such motion." At the same time there was added, as a separate rule, the following, now paragraph 5 of Rule XXXVIII: "When the Senate shall adjourn or take a recess for more than thirty days, all motions to reconsider a vote upon a nomination which has been confirmed or rejected by the Senate, which shall be pending at the time of taking such adjournment or recess, shall fall; and the Secretary shall return all such nominations to the President as confirmed or rejected by the Senate, as the case may be."

nized that the President was authorized to commission a nominee upon receiving notification of the advice and consent of the Senate, and that the signing of a commission cut short the power of reconsideration. The Senate so concedes. No explicit change in this respect was made either in the rules of 1867 or of 1868. The inference that no change was intended is strengthened by the fact that under the latter rules, for the first time, the sending of notification ordinarily coincided with the lapse of power in the Senate to reconsider its action, under any circumstances. The proviso, "unless otherwise ordered by the Senate," made possible the sending of notification before the expiration of the period provided for reconsideration. But there is no indication that the Senate intended thereby to introduce a complete departure from past practice. The natural inference is to the contrary. The proviso for immediate notification must be read in connection with the clause permitting motions to request the return of a resolution, which would be in order only in cases in which the Senate had acted under the proviso. A motion to request the return of a resolution was a familiar device, employed by the Senate on repeated occasions. There is no reason to suppose that such a motion was now intended to have a different effect than that which, by common understanding, it had had in the past. The common understanding had been that a motion to request the return of a resolution was without effect if the President before receiving it had completed the appointment.

Fifth. This construction of the rules is confirmed by the precedents in the Senate arising since 1868. In all cases in which no commission had yet issued, the Executive has honored the request of the Senate for a return of its resolution, in accordance with the invariable practice from the beginning.[16] In the only instances, prior to the case at bar, in which the Senate had occasion to consider the effect, under the present rules, of the signing of the commission before receipt of its request, it indicated an understanding

[16]The list of precedents incorporated in the record includes some 170 cases of nominations, arising since March 25, 1868, in which motions to reconsider and request the return of the resolution were entered. In almost all the cases the Senate Executive Journal records affirmatively that the President complied with the request. In a few instances the fact of such return is not recorded, although the Senate proceeded with the reconsideration. In no case, except the two referred to in the text, does it affirmatively appear that

that the power to reconsider was gone.[17] In those two cases the President wrote informing the Senate of the issuance of a commission, and no further action was taken by it.

Attention is called, however, to other cases in which it is contended that the President returned the resolution in spite of the intervening signing of a commission, and that the Senate reconsidered its action. Sixteen cases arising after 1868 are cited.[18] The value of most of these cases as precedents is questioned by Smith, and also by the Attorney General and the Solicitor General in the brief filed by them *amici curiae*. In none of the cases is there any indication that the Senate was informed of the fact of the signing of the commission, if in fact the commission was

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the President declined to return the resolution. In no case since the earliest precedent listed, in 1830, is there a record of refusal to honor the request on any other ground than that a commission had been signed and the appointment perfected.

[17]In the case of J. C. S. Colby, nominated as Consul at Chin Kiang, the Senate on December 17, 1874, voted to confirm and ordered that the President be notified forthwith. On December 21 a motion to reconsider was entered and the return of the resolution was requested. President Grant replied, "Mr. Colby's commission was signed on the 17th day of December, and upon inquiry at the Department of State it was found that it had been forwarded to him by mail before the receipt of the resolution of recall." There is no evidence of further action on the part of the Senate.

Morris Marks was confirmed as Collector of Internal Revenue for the District of Louisiana on June 6, 1878. On June 11 a motion to reconsider was entered and the return of the resolution requested. President Hayes wrote: "In reply I would respectfully inform the Senate that upon the receipt of the notice of confirmation the commission of Mr. Marks was signed and delivered to him, on the 8th instant." The Senate Executive Journal records the fact that this message was read, but contains no reference to any subsequent proceedings in the case.

[18]The cases of Lewis A. Scott, originally confirmed on June 7, 1870, as Postmaster at Lowville, New York; John W. Bean, confirmed as first lieutenant on January 11, 1872; James F. Legate, confirmed as Governor of Washington Territory on January 26, 1872; George Nourse, confirmed as Register of the Linkville Land Office, Oregon, June 5, 1872; Alva A. Knight, confirmed as United States Attorney for the Northern District of New York, January 21, 1873; Belle C. Shumard, confirmed as Deputy Postmaster at Fort Smith, Arkansas, February 6, 1873; Peter C. Shannon, confirmed as Chief Justice of the Supreme Court of Dakota Territory, March 17, 1873; E. Raymond Bliss, confirmed as Deputy Postmaster at Columbus, Mississippi, March 18, 1873; John W. Clark, confirmed as Deputy Postmaster at Montpelier, Vermont, March 20, 1873; William H. Tubbs, confirmed as Postmaster at New London, Conn., December 20, 1878; Joseph H. Durkee, confirmed as Marshal of the Northern District of Florida, June 30,

signed. Therefore, none of those cases furnish an authoritative construction by the Senate of its own rules made prior to the events culminating in the present litigation. They amount, at most, only to evidence of the construction placed upon the rules by the Executive Department. The weight of many of the cases, as such evidence, is further lessened by the circumstance that the records do not disclose beyond dispute that a commission had actually been signed by the President before receipt of the Senate's request for return of its resolution.[19] All the cases but one arose

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1879; Laban J. Miles, confirmed as Indian Agent at Osage Agency, Indian Territory, February 15, 1883; George W. Pritchard, confirmed as United States Attorney for the Territory of New Mexico, February 19, 1883; Thomas H. Reeves, confirmed as Indian Agent, Quapau Agency, Indian Territory, April 9, 1884; Edwin I. Kursheedt, confirmed as Marshal for the Eastern District of Louisiana, March 27, 1889; and William Plimley, confirmed as Assistant Treasurer, March 10, 1903.

In the Bean, Legate, Nourse, and Kursheedt cases, the Senate Executive Journal does not record whether or not the President returned the resolution, as requested. The President withdrew the nomination of Mr. Legate, on his own request, before the Senate had proceeded further than to debate the motion to reconsider. The Reeves and Plimley nominations were also withdrawn. In the Scott, Knight and Miles cases the motion to reconsider was withdrawn after return of the resolution; in the Durkee case it was tabled; and in the Bliss and Pritchard cases, when put to a vote, it failed. In the Clark case no further proceeding is recorded after the return of the resolution. In the Shannon and Tubbs cases the nominee was again confirmed; in the Shumard, Bean, Nourse, and Kursheedt cases, the Senate adopted the motion to reconsider, and either recommitted the nomination or placed it upon the calendar. Only in the last six cases did the Senate in fact exercise the power to reconsider.

It is conceded by Smith that in the cases of Legate, Shumard, and Plimley, a commission had in fact been signed by the President at the time he received and acceded to the request for return of the resolution. In the remaining cases the evidence of signing of the commission rests mainly upon entries of dates in the records of the executive offices of the White House. In the Knight and Miles cases there are also copies of the commission in the records of the respective departments. The entry of the date of commission in the Tubbs case appears to have been erased, although it is still legible. Those in the Reeves and Kursheedt cases are scratched or crossed out. See note 19, *infra*.

[19]The contention of Smith, in which the Attorney General and Solicitor General concur, is that the dates relied on in the White House records are the dates which the commissions bore, but not necessarily those on which they were signed. The practice in the executive offices in this respect appears not to have been uniform. Thus, in certain instances pointed

between 1870 and 1889, nine of them in the administrations of President Grant and President Hayes. Each of these Presidents on occasion refused to accede to similar requests on the ground that a commission had already been issued.[20]

Perhaps the most satisfactory explanation of the instances cited on behalf of the Senate is that the Executive Department has not always treated an appointment as complete upon the mere signing of a commission.[21] Compare *Marbury* v. *Madison,* 1 Cranch. 137; *United States* v. *Le Baron,* 19 How. 73, 78. Even in the view most favorable to the Senate's contention they fall far short of clear recognition of the power, never heretofore asserted by the Senate itself, to reconsider a vote of confirmation, after an appointee has actually assumed office and entered upon the discharge of his duties. We are unable to regard any of the cases as of sufficient weight to overcome the natural meaning of the clauses.[22]

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out in the brief *amici curiae,* taken from a later period, it appears affirmatively, under the heading "Remarks", that the commission was actually signed at a date subsequent to that entered under the heading "Commissioned." On the other hand in the Plimley case, *supra,* note 18, and in the Colby and Marks cases, *supra,* note 17, other evidence indicates that the signature was in fact made on the date entered in the White House records. It appears to be the practice for the appropriate department to prepare the commission in all respects, including the date, upon receipt of notification of confirmation, and thereafter to present it to the Executive to be signed. This practice creates the possibility of disparity between the date of signing and the date of appearing on the commission.

[20]In the Colby and Marks cases, respectively, *supra,* note 17. The most recent case, which is urged as strongly supporting the Senate's contention, is that of William Plimley. President Roosevelt nominated Plimley in 1903 for Assistant Treasurer of the United States. His commission was made out and signed, and a letter notifying him of his appointment and enclosing an official bond was placed in the mails. Notice of a motion to reconsider the vote of confirmation having been received at the White House, the chief of the division of appointments ordered the letter extracted from the mails, and the President returned the resolution and subsequently withdrew the nomination.

[21]Thus, it will be noted in both the Colby and Marks cases, *supra,* note 17, that the commission had been either placed in the mails or delivered, and that the message of the President placed emphasis on these facts.

[22]In addition to the Senate precedents above discussed, counsel for the Senate cite various decisions from state courts relating to reconsideration by state and municipal deliberative bodies. People *ex rel.* MacMahon *v.* Davis, 284 Ill. 439; Witherspoon *v.* State *ex rel.* West, 138 Miss. 310; Wood *v.* Cutter, 138 Mass. 149; Crawford *v.* Gilchrist, 64 Fla. 41; Dust *v.* Oatman, 126

Sixth. To place upon the standing rules of the Senate a construction different from that adopted by the Senate itself when the present case was under debate is a serious and delicate exercise of judicial power. The Constitution commits to the Senate the power to make its own rules; and it is not the function of the Court to say that another rule would be better. A rule designed to ensure due deliberation in the performance of the vital function of advising and consenting to nominations for public office, moreover, should receive from the Court the most sympathetic consideration. But the reasons, above stated, against the Senate's construction seem to us compelling. We are confirmed in the view we have taken by the fact that, since the attempted reconsideration of Smith's confirmation, the Senate itself seems uniformly to have treated the ordering of immediate notification to the President as tantamount to authorizing him to proceed to perfect the appointment.[23]

The judgment of the Supreme Court of the District is

Affirmed.

Mich. 717. None of these cases, however, presented the question here at issue of the effect upon the power to reconsider of an intervening notification of confirmation sent to an appointing officer, and of the signing by that officer of a commission. It is therefore unnecessary to examine the reasoning upon which they were decided.

[23]Thus in the confirmation of Judge Louie W. Strum, Senator Fletcher in seeking unanimous consent "to waive the rule about two subsequent executive sessions," and notify the President of the Senate's action, gave as his reason that "this judge is very much needed, and has been for some months." 74 Cong. Rec., pt. 7, pp. 6489-6490. Notification was ordered on December 21, 1931, of votes confirming nominations to the Interstate Commerce Commission and the Board of Mediation upon the statement of Senator Couzens that otherwise "those gentlemen . . . can not hold office until after two executive sessions shall have been held." Cong. Rec., 72d Cong., 1st Sess., December 21, 1931, p. 1003. Again, on December 22, 1931, on the confirmation of Robert B. Adams as engineer in chief of the Coast Guard, Senator Copeland stated that "this man's appointment expired on the 18th of December, and it is very important that he be immediately put on duty." Notification was ordered. *Id.*, p. 1131. On February 1, 1932, notification was ordered of the confirmation of certain appointees to the Reconstruction Finance Corporation board, upon the statement of Senator Robinson that "it is believed that there is necessity for the board to function immediately." *Id.*, p. 3071. See also, *id.*, pp. 3415, 3582, 3881.